SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 429

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, PETITIONER,

vs.

ULUETTA PRINSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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a [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and proceedings before the Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, presiding, in the following-entitled cause:

Law. No. 12831

ULUETTA PRINSEN, Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, a Corporation, Defendant

IN DISTRICT COURT OF STATE OF UTAH

COMPLAINT—Filed in State Court Nov. 24, 1931; filed in D. C. U. S., Dec. 28, 1931

Comes now the plaintiff above named and for cause of action against the defendant complains and alleges as follows, to-wit:

I

That the defendant, The Travelers Protective Association of America, is now and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Missouri, with principal place of business at St. Louis, Missouri, and authorized to do, and doing business in the State of Utah, as a foreign fraternal benefit society.

II

That on the 13th day of October, 1915, the defendant, for a valuable consideration, made, executed and delivered to James Prinsen, its certificate of membership No. 133665; that by the terms of said certificate defendant certified and agreed that the said James Prinsen was a member of said

defendant association and was entitled to such benefits as might be provided in and by the constitution, by-laws and articles of incorporation of said association, in force and effect at the time any accident occurred from which a claim for benefits arose, and that in case of death the said benefits [fol. 2] should be payable to plaintiff, the wife of said James Prinsen; that it was further agreed by the terms of said certificate and by the provisions of the constitution, by-laws and articles of incorporation of said defendant, that whenever a member in good standing and subject to the conditions, provisions and limitations of said constitution and amendments thereto should, through external, violent and accidental means, receive bodily injuries which, within six months next following the date of said accident, result in death of such member, his beneficiary should be entitled on account of such death and subject to the conditions, provisions and limitations of said constitution and amendments thereto, to receive the sum of Five Thousand ($5,000.00) Dollars; that said certificate, and the terms and conditions of the constitution, by-laws, articles of incorporation, and amendments of said defendant association, as above alleged, were in full force and effect at the time hereinafter mentioned, and that at said times plaintiff was and ever since the 15th day of October, 1915, had been, the wife of said James Prinsen and the beneficiary named in said certificate of membership and entitled in case of the death of the said James Prinsen, to the benefits thereunder.

III

That on the 3rd day of February, 1931, at or near, Cudahy Lane, Davis County, State of Utah, a railroad train, then and there owned, operated and controlled by the Denver & Rio Grande Western Railroad Company, a corporation, collided with an automobile in which the said James Prinsen was riding, causing bodily injuries to the said James Prinsen and which injuries resulted in his death on said day; that the collision between said train and the automobile in which the said James Prinsen was riding was violent and accidental and that the bodily injuries received by the said James Prinsen, as the consequence of said collision, independently of all other causes, solely and exclusively caused and resulted in his death.

IV

That at the time of the death of the said James Prinsen as aforesaid, he was, and ever since the 13th day of October, 1915, had been a member in good standing of the defendant association, and that there is no condition, exception or lim-[fol. 3] itation contained in the certificate, constitution, by-laws or articles of incorporation of said defendant association or of any amendments thereto which abridge, qualify or limit the right of plaintiff to receive the death benefit as hereinabove alleged.

V

That said membership certificate further provides that in case of the death of such member the beneficiary shall notify the secretary of said defendant association in writing within thirty days after such accident giving full particulars of the same and the name of the attending physician or surgeon; that in accordance therewith plaintiff, the beneficiary named in said certificate and within thirty days from the date of said accident, notified the secretary of said defendant association, at the office of said association at St. Louis, Missouri, of such accident in writing, giving full particulars of the same and the name of the attending physician and otherwise fully performed all of the terms and conditions of said membership certificate upon her part to be done and performed.

VI

That notwithstanding all of the matters and things hereinabove alleged and notwithstanding that plaintiff has made repeated demands upon said defendant, the said defendant has failed, refused and neglected and still does fail, refuse and neglect to pay said death benefit to plaintiff; that there is now due, owing and unpaid from defendant to plaintiff the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon at the rate of eight per cent per annum since the 3rd day of February, 1931, no part nor parts of which has been paid.

Wherefore, plaintiff prays judgment against defendant for the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon at the rate of eight per cent per annum

since the 3rd day of February, 1931, until paid, and for her costs herein incurred.

Harley W. Gustin, Peterson & Clark, Attorneys for Plaintiff.

[fol. 4] Duly verified.

[File endorsements omitted.]

IN DISTRICT COURT OF STATE OF UTAH

PETITION FOR REMOVAL—Filed Dec. 1, 1931

Now comes your petitioner, the above-named defendant, and appearing solely for the purpose of this motion and for no other purpose, files this its Petition for the removal of the above-entitled cause to the District Court of the United States for the Central Division of Utah, and respectfully shows to the court that this is a civil action at law, filed in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, being an action brought by the above-named plaintiff against the above-named defendant upon a contract of insurance, in which action the plaintiff seeks to recover from said defendant for the alleged death, from alleged accidental means, independently of all other causes, of the assured named in said certificate; that the controversy in said cause is wholly between citizens of different States; that the plaintiff was at the time of the commencement of said suit, ever since has been and still is a citizen of the State of Utah and a resident of said State, and that the defendant was at the time of the commencement of said suit, ever since has been and still is a corporation organized under the laws of the State of Missouri, a citizen of said State, a resident of said State and a nonresident of the State of Utah; and that the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). And your petitioner further shows that the time within which said defendant is required by the laws of the State of Utah and by the rules of this court to answer or plead in said cause has not yet expired.

And your petitioner offers herewith a bond of good and sufficient surety for its entering into the District Court of

the United States for the Central Division of Utah, within [fol. 5] thirty (30) days of the date of the filing of this petition, a certified copy of the record in said cause and for paying all costs that may be awarded by said District Court if said court shall hold that this cause was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to approve said surety and bond and to cause the record herein to be removed into the said District Court of the United States for the Central Division of the State of Utah.

The Travelers Protective Association of America, by T. S. Logan, Secretary. Bagley, Judd & Ray, Attorneys for Petitioner. (Corporate Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF STATE OF UTAH

ORDER FOR REMOVAL—Filed Dec. 12, 1931

The defendant herein, The Travelers Protective Association of America, having filed its petition in due time and form for removal of this cause to the District Court of the United States, in and for the District of Utah, and also having filed a bond in the sum of $500.00 conditioned as provided by law, with good and sufficient sureties, and it appearing to the court that the above titled action should be removed to the said District Court of the United States, as prayed in said petition, and that the aforesaid bond is good and sufficient;

Now, Therefore, it is Ordered, Adjudged And Decreed that said bond be accepted and approved and that the above entitled cause be, and it is hereby, removed to said District Court of the United States, in and for the District of Utah, and the clerk of this court is hereby directed to prepare and certify a transcript of the record herein to be entered in the

[fol. 6] said United States District Court, and that no further proceedings be had herein in this cause in this court.

Done in open court this 12th day of December, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by Fred C. Bassett, Deputy Clerk. (Seal.)

[File endorsement omitted.]

RECITAL AS TO BOND

[Bond on removal in the sum of $500, with defendant as principal and Fidelity and Deposit Company of Maryland as surety, was filed in the Third Judicial District Court, State of Utah, on Dec. 1, 1931.]

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Jan. 20, 1932

Comes now the above named defendant The Travelers Protective Association of America, and for answer to the complaint of plaintiff on file herein admits, denies and alleges:

1. Admits and alleges that this defendant is, and was at all times mentioned in plaintiff's complaint, a fraternal beneficiary association without capital stock, duly organized and existing as such under the laws of the State of Missouri relating to fraternal beneficiary associations, and has been and is duly authorized and licensed by the Commissioner of Insurance of that and other states, including the State of Utah, to do business as a fraternal beneficial society. That said Association was and is operated solely for the mutual benefit of its members and their beneficiaries and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provision for the payment of benefits to the class of persons designated by law in case of death or injury resulting from accidental means independently of all other

causes, subject to the exceptions, limitations and conditions set out in the Constitution and By-Laws of the Association and subject to compliance therewith by its members and their beneficiaries. That said Association is operated and has always been operated for the sole benefit of its members and their beneficiaries, and that such is and always has been its sole object and purpose. That incident thereto, it issues and has issued to its members benefit certificates, the amount payable thereunder being derived from the proceeds of its regular semi-annual dues or assessments of all the members of the Association. That those eligible to membership in said Association were and are commercial travelers in good standing and buyers and sellers in wholesale trade. That defendant's Articles of Association and Charter provide that the main purpose and object of this Association is to bring about better acquaintance and a more fraternal and binding feeling between persons engaged in the business of commercial travelers and the business of selling merchandise at wholesale, and to that end to secure from all transportation companies and hotels just and reasonable rates for commercial travelers as a class.

2. This defendant admits and alleges that heretofore James Prinsen made application to become a member of the [fol. 8] defendant Association and was thereafter duly admitted to membership and a certificate of membership was executed, issued and delivered by the defendant to said James Prinsen under date of October 13, 1915, bearing No. 133665. That by said certificate of membership so issued to said James Prinsen it was and is provided that the application of James Prinsen, the certificate of membership, the Articles of Incorporation of the defendant, and its Constitution and By-Laws, and all amendments thereto, in force and effect at the time of the event alleged to have given rise to a claim for benefits, constitute the contract between the defendant and said James Prinsen and should govern and control the payment of benefits thereunder. That said James Prinsen, by said certificate and said other instruments, did agree and contract with this defendant that said instrument should constitute the contract between said James Prinsen and defendant and should determine and control all payments of all benefits. That the Constitution of this defendant in force at the time such certificate was issued to said James Prinsen, ever since that time, and at

the present time, provided and provides that the right to death benefits does not exist in all cases but only in such cases as do not fall within the limitations, conditions and exemptions of the provisions of the Constitution. That by said application and said certificate said James Prinsen did agree to all of said provisions and the same became a part of the contract entered into between him and this defendant as aforesaid.

3. Admits and alleges that on the 3rd day of February, 1931, at or near Cudahy Lane, Davis County, State of Utah, a railroad train owned and operated by the Denver & Rio Grande Western Railroad Company, collided with an automobile truck loaded with explosive substance or substances, to-wit, a large number of dynamite caps, on which truck said James Prinsen was at the time riding, and had been riding, for the purpose of aiding and participating in the delivery and/or moving and/or transportation of said dynamite caps and/or other explosive substances, and said James Prinsen was killed in the explosion resulting from said collision between said train and said truck carrying said dynamite caps.

4. This defendant denies each and every other allegation, matter or thing in plaintiff's complaint contained not hereinbefore or hereinafter admitted, modified or denied.

5. Further answering said complaint, and as its separate [fol. 9] and additional defense thereto, this defendant alleges that under and by the express terms and provisions of the certificate issued to said James Prinsen and the Articles of Incorporation, Constitution and By-Laws of this defendant, and each of them, in full force at all times mentioned in plaintiff's complaint, it was expressly provided, among other things, that this defendant Association shall not be liable to the member, or his beneficiary in case of injuries, fatal or otherwise, "when a member is participating * * * in the moving or transportation of gunpowder, dynamite or other explosive substance or substances"; and this defendant alleges that by reason of the foregoing provision of said instruments said James Prinsen did contract with this defendant that neither he nor his beneficiary named in such certificate should under any circumstances have any right or rights under said contract on account of fatal injuries inflicted or suffered when and while par-

ticipating in the moving or transportation of gunpowder, dynamite or other explosive substance or substances; and this defendant alleges that the death of said James Prinsen was directly and proximately caused by reason of the fact that he was on said automobile truck and came into collision with said train when and while he was participating in the moving and transportation of said load of dynamite caps; and this defendant alleges that on account of the foregoing matters plaintiff is not entitled to any benefit or benefits whatsoever from this defendant under said contract growing out of the death of said James Prinsen as aforesaid.

6. Further answering said complaint, and as its separate and additional defense thereto, this defendant alleges that the said Certificate, Articles of Incorporation, Constitution and By-Laws of this defendant, and each of them, in force at all times mentioned in plaintiff's complaint, expressly provided and provide that there shall be no liability on the defendant Association when the death of the member is "the result of voluntary or unnecessary exposure to danger or to obvious *risk* of injury." And this defendant alleges that by reason of the foregoing provision of said instruments said James Prinsen did contract with this defendant that neither he nor his beneficiary named in such certificate should under any circumstances have any right or rights under said contract on account of injuries, fatal or otherwise, when and if the death of said James Prinsen [fol. 10] should result from his voluntarily or unnecessarily exposing himself to danger or to obvious risk of injury; and in this connection this defendant alleges that the death of said James Prinsen was the result of his voluntarily and unnecessarily exposing himself to danger and obvious risk of injury in riding upon said automobile truck loaded with dynamite caps as aforesaid, and in heedlessly, negligently, voluntarily, and unnecessarily allowing said automobile truck so loaded with said dynamite caps to be driven onto said railroad track in front of a rapidly moving train approaching thereon which was then and there in plain sight and which said James Prinsen, by the exercise of the slightest care on his part, could have both seen and heard in ample *time* to have caused said automobile so loaded with dynamite caps to be stopped before entering upon said track in front of said train.

7. Further answering said complaint, and as its separate and additional defense thereto, this defendant denies that it ever executed or delivered to said James Prinsen any certificate other than the certificate alleged and described in this answer; and this defendant denies that it ever executed or delivered to said James Prinsen any contract other than the contract described in this answer; and this defendant alleges that it never executed or delivered to said James Prinsen any certificate other than the certificate referred to in this answer and never executed or delivered to said James Prinsen any contract other than the contract as in this answer alleged, and never entered into any contract with said James Prinsen other than the contract described in this answer.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by her complaint herein and that it be dismissed and have and recover its costs.

Bagley, Judd & Ray, Attorneys for Defendant.

Duly verified.

Received copy of foregoing Answer this 20th day of January, 1932.

Peterson & Clark, Harley W. Gustin, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

REPLY—Filed June 1, 1932

Comes now the plaintiff above named and for reply to defendant's answer heretofore filed herein admits, denies and alleges as follows:

I.

Denies that at the time of the injury to the said James Prinsen, as alleged in plaintiff's complaint on file herein, the said James Prinsen was aiding or participating in the delivery and/or moving and/or transportation of dynamite caps, gunpowder, dynamite or any explosive substance or substances, or that the said James Prinsen was killed as a result of the explosion of any dynamite caps,

gunpowder, dynamite or any explosive substance or substances.

II

Denies that the death of the said James Prinsen, as alleged in plaintiff's complaint on file herein, was directly or proximately caused by participation in the moving or transportation of dynamite caps or that the said James Prinsen, at the time of the injury alleged in plaintiff's complaint, was participating or aiding in the moving, delivery or transportation of dynamite caps or any explosive substance or substances.

III

Denies that at the time of the injury alleged in plaintiff's complaint the said James Prinsen voluntarily and/or unnecessarily exposed himself to danger or obvious risk of injury in riding upon an automobile truck loaded with dynamite caps or otherwise, or that he heedlessly, negligently, voluntarily or unnecessarily allowed the automobile, in which he was riding at the time of said injury, as alleged in said complaint, to be driven onto or upon any railroad track in front of a rapid moving train approaching thereon, or otherwise, and denies that any railroad train at said time and place was then and there in plain sight or could be seen and heard by the said James Prinsen, and denies that said automobile could be stopped before entering upon any railroad track in front of any railroad train as alleged in defendant's answer on file herein.

IV

For further reply to defendant's answer on file herein plaintiff alleges that the said James Prinsen, at the time [fol. 12] and place of the injury alleged in the complaint on file herein, was riding in and upon the automobile struck by the railroad train as alleged in said complaint, as an invitee and/or guest and not otherwise, and that the said James Prinsen was not operating said automobile nor did he have any control in the operation or running thereof.

V

For further reply to defendant's answer on file herein plaintiff alleges that the policy of insurance mentioned

and described in plaintiff's complaint on file herein was made, executed and delivered to the said James Prinsen, by defendant with full knowledge and upon the understanding and agreement that the said James Prinsen was employed as a powder salesman by the Western Powder Company, a Utah corporation, which was then and there engaged in the handling, purchase, sale and distribution of dynamite caps, gunpowder and dynamite.

VI

Denies generally each affirmative allegation contained in defendant's answer not herein specifically admitted, modified or denied.

Wherefore plaintiff having fully replied to defendant's answer on file herein prays that said answer be taken for naught and that she have the relief prayed for in her complaint on file herein.

Peterson & Clark, Harley W. Gustin, Attorneys for Plaintiff.

Duly verified.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DIRECTING VERDICT—June 1, 1932

At this 1st day of June, 1932, come plaintiff by H. W. Gustin and D. W. Clark, her attorneys, and defendant by E. M. Bagley, its attorney, also comes. And this cause coming on regularly for trial thereupon comes a jury to-wit: Lawrence Manning, J. A. Haigh, Fred W. Chambers, R. L. Mitchell, Ben Willougby, Ezra Brown, John H. Peterson, John V. Rouche, Archie Farr, Hyrum Christen- [fol. 13] sen, E. C. Hogan and R. W. Morgan, twelve good and lawful men and they are duly empaneled and sworn to well and truly try this cause and a true verdict render according to the evidence. And certain stipulations were made by counsel and certain documentary evidence introduced and plaintiff rests. And on the part of defendant C. R. Fitzgerald was sworn and examined as a witness and

defendant rests. And the motion of defendant for a directed verdict—no cause of action was argued by counsel and by the court sustained and said jurors by direction of the court returned the following verdict to-wit:

"We, the jury duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, The Travelers Protective Association of America and against the plaintiff, Uluetta Prinsen—'No cause of Action,' by direction of the court. R. W. Morgan, Foreman."

Wherefore, it is ordered and adjudged by the court that plaintiff, Uluetta Prinsen, take nothing by her complaint herein and that defendant recover of and from plaintiff its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

IN UNITED STATES DISTRICT COURT

VERDICT—Filed June 1, 1932

We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant The Travelers Protective Association of America and against the plaintiff Uluetta Prinsen—"No cause of Action," by direction of the court.

R. W. Morgan, Foreman.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—June 1, 1932

At this 1st day of June, 1932, the same being a juridical day of the April Term, 1932, Central Division of said court, present, Honorable Tillman D. Johnson, Judge, plaintiff appearing by H. W. Gustin and D. W. Clark, her attorneys, and defendant by E. M. Bagley, its attorney, also appearing, and this cause coming on regularly for trial by a jury of twelve good and lawful men were duly

empaneled and sworn to well and truly try this cause and [fol. 14] a true verdict render according to the evidence. And the jurors having heard the evidence, thereupon defendant moved the court for a directed verdict—no cause of action—and the court having heard the arguments of counsel sustained said motion, whereupon jurors by direction of the court returned the following verdict, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, The Travelers Protective Association of America, a corporation, and against the plaintiff, Uluetta Prinsen 'No cause of action,' by direction of the court. R. W. Morgan, Foreman."

Wherefore, it is ordered and adjudged by the court that plaintiff, Uluetta Prinsen, take nothing by her complaint herein and that defendant recover of and from plaintiff its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

In United States District Court

Bill of Exceptions—Filed July 12, 1932

Be It Remembered that on the 1st day of June, 1932, the above entitled cause came on for trial before Honorable Tillman D. Johnson, judge of said court, sitting with a jury, the plaintiff appearing by Harley W. Gustin and D. Worth Clark, her attorneys, and the defendant by E. M. Bagley, its attorney.

Whereupon the following proceedings were had:

(A jury of twelve good and lawful men were duly called, examined, chosen and sworn herein.)

Plaintiff's Exhibit A, the same being the Certificate of Membership or so-called insurance policy involved herein and referred to in plaintiff's complaint, was offered and received in evidence, the same reading as follows:

Plaintiff's Exhibit "A"

T.P.A. T.P.A.

The Travelers Protective Association of America

A Fraternal Benefit Society Incorporated. Under the laws of the State of Missouri. By this Certificate of Mem-

bership Certifies That James Prinsen, of Salt Lake City, [fol. 15] Utah, is a member of said The Travelers Protective Association of America, and is entitled to such benefits as may be provided in and by the Constitution, By-Laws and Articles of Incorporation of said Association, in force and effect at the time any accident occurs from which a claim for benefits arises. Benefits in case of death payable to Ulnetta Prinsen, his wife. This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Association and application for Membership, signed by said member and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made shall bind said member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to, and were in force at the time of said member's application for membership.

In Witness Whereof, this Association has caused this Certificate to be signed by its President and Secretary under the seal of the Association at St. Louis, Mo., this 13th day of October, A. D. 1915. No. 133665.

C. F. Tomlinson, President. T. S. Logan, Secretary. (Seal.)

T.P.A. T.P.A.

(In red printing across face of the above appears the following:)

Any member meeting with an accident must notify the National Secretary in writing within thirty days of such accident, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice. In case of failure to notify except because of unconsciousness or physical inability the member or his beneficiaries shall forfeit all rights to insurance benefits.

(Reverse side is as follows:)

The following benefits are paid subject to the conditions, exceptions and limitations of the Constitution of the Association and amendments thereto, whenever a member in

good standing shall, independently of all other causes, [fol. 16] through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death or disability:

1. $10,000 if killed by accident while riding as a passenger inside a passenger car on a passenger train, propelled by steam. 2. $5,000 if killed by accident. 3. $5,000 for the accidental loss of both legs or both arms by severance. 4. $2,500 for the accidental loss of one hand or one foot by severance above wrist or ankle. 5. $1,300 in case of accidental loss of four fingers of either hand by severance. 6. $5,000 in case of accidental loss of both eyes. 7. $1,250 in case of accidental loss of one eye. 8. $25 per week for total disability, from accident, not exceeding 104 weeks. 9. $12.50 per week for partial disability following total disability, from accident, not exceeding five weeks.

Change of Beneficiary

I hereby direct that the beneficiary named in the within certificate be changed to —— ——, whose relation to me is —. (Certificate cannot be made payable to Estate or Executor.) First or given name of beneficiary must be in full, and agree to accept the Articles of Association, Constitution, By-Laws, and all Amendments to each as existing at this date and as hereafter adopted.

Dated at —— on the — day of ——, 191-.

—— ——, Signature of member named in this certificate.

Witness: One witness sign here: —— ——.

If change of beneficiary is desired, please fill out the above blank and mail to The National Secretary, at St. Louis, Mo.

Sec. 9. Any member in good standing wishing a new certificate or change of beneficiary may have said certificate issued or beneficiary changed by surrendering his certificate then in force and paying to the National Secretary a fee of 50 cents (said fee to be credited to expense fund), except that in the event of death of beneficiary or marriage of a member, this charge is remitted.

[fol. 17] No. 133665. Certificate of Membership in the Travelers Protective Association of America, St. Louis,

Mo. Issued to J. Prinsen, Salt Lake City, Utah Division.

In case of injury, fatal or disabling, immediately notify the Secretary of the Travelers Protective Association, at St. Louis, Mo.

(In ink:) Ex. A.

Plaintiff's Exhibit A-1 was then received in evidence the same being the envelope enclosing the insurance policy (Exhibit A) the material portions of which are as follows:

PLAINTIFF'S EXHIBIT "A-1"

Notice of Accident

Sec. 8. Any member in good standing meeting with any accident, as described in this article, must notify the National Secretary in writing within thirty days, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice within thirty days. In case of failure to notify, except because of unconsciousness or physical inability, the member, or his beneficiary in case of death, shall forfeit all rights to insurance benefits. Sec. 8, Art. 9, Constitution. * * * In case of injury, fatal or disabling, notify the Secretary of the Travelers Protective Association, within thirty days at St. Louis.

Plaintiff's Exhibit B, the same being Statement of the Beneficiary and Proof and Notice of Loss, was then introduced in evidence and reads as follows:

PLAINTIFF'S EXHIBIT "B"

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Statement of Beneficiary

In the matter of Estate of James Prinsen, late of Salt Lake City.

1. My full name and address are Uluetta C. Prinsen, 958 East 1st So., Salt Lake City. 2. My relationship to

deceased is that of wife. 3. His exact age 56 years 3 months 14 days. Height 5 ft. 7 in. Weight about 155. [fol. 18] 4. Exact date and place of death—Feb. 3 - 1931, Salt Lake City. 5 My own personal knowledge of the accident in question is as follows: (If necessary use additional sheets to answer this question and to give facts derived from others.) My first notification of the accident that resulted in the death of my husband, James Prinsen, was a telephone communication of a Newspaper Reporter from the Salt Lake Telegram. 6. The names and addresses of the eye-witnesses are: J. O. McClury, Farmington, Utah; Dale Shulthies, Woods Cross, Utah; W. E. James, 1228 So. 5th East, Salt Lake City (See newspaper clipping enclosed.) 7. What sicknesses or diseases did deceased have during the past five years and what was the state of his health at the time? Perfectly well and had no sickness of any kind was in perfect health. 8. What physicians at any time treated him for said diseases or for any physical or mental ailment or disorder? (Give names and present addresses.) Had no occasion to consult any physician in the last five years. 9. In what manner was deceased affected by the injury at the time it was inflicted? Death resulted immediately from the accident. 10. At what time after the injury was physician called? Dr. J. J. Galligan was called immediately. 11. What instructions and treatment did the physician give? Not any. 12. Was deceased ever unconscious or delirious as a res-lt of an injury or other cause? Never. 13. What other accident insurance did deceased carry at the time of his death? (State amounts and names of Companies or Associations and dates of Insurance.) No other. 14. If he carr-ed any Life or Health Insurance (or both), state amounts, dates, names of Companies or Associations. About $14,500.00 in New York Life Insurance Co. 15. Give names of any Life, Health or Accident Companies or Associations that rejected him or cancelled his insurance. None. 16. In what occupation was he engaged at the time of his death? Mgr. Western Powder Co. 17. State fully what were all of his duties in his occupation? General duties as manager largely office management. 18. What was his average monthly income? Monthly salary $400.00. 19. At what places had deceased lived before locating in, Pocatello, Idaho & St. Paul, Minn. 20. To what extent did he use

intoxicating liquors or drugs? None at all at any time. 21. Had he partaken of intoxicants within 24 hours of his injury? No. 22. Has any one else any kind of interest in your claim against this Association? If so, state their interest and give their names and addresses. No. 23. Was [fol. 19] deceased ever injured prior to the time in question? No. If so, state when and how; how long disabled, and whether he received indemnity from any accident insurance or transportation company. 24. If he ever received any indemnity or benefits from any Health Insurance Company, lodge or Association for accident or sickness, state amounts and names of Companies. No. 25. What visible marks or signs of injury resulting from the accident in question did you at any time observe on body of deceased? (Describe them fully.) I was not allowed to see the remains. 26. According to your information and belief, what other causes in addition to the alleged injury contributed to the death of deceased. The accident was the sole cause of his death.

By furnishing this blank and investigating the claim I agree that the Association shall not be held to admit the validity of any claim or waive any of the provisions of its Constitution or any defense it may have.

I hereby warrant *that* the statements in this and all of the other certificates herein to be strictly true and made in good faith.

(Signed) Uluetta C. Prinsen, Beneficiary.

STATE OF UTAH,
County of Salt Lake:

Sworn to and subscribed by the above-named beneficiary before me *me* this 2nd day of March, 1931.

Name of Official: Homer Holmgren; Title: Notary Public; P. O. Address: Salt Lake City, Utah. (Seal.)

Form 36 5C 8-28.

(Reverse side as follows:)

The Travelers Protective Association of America. Proofs of the Death of James Prinsen of Salt Lake City, Utah, who died on the 3rd day of Feb., 1931. Certificate No. 133665 and 67742, Division Utah. Post A Check No.

—. Claim No. —. Paid. Amount Paid, $—. T. S. Logan, Secretary, 3755 Lindell Boul., St. Louis, Mo.

(In ink:) Ex. B.

[fol. 20] The Court: Any other Exhibits? Any exhibits you want?

Mr. Bagley: Yes, I would like to follow. (Defendant's Exhibits Nos. 1, 2 and 3 were thereupon marked by the reporter.)

Mr. Gustin: We object to the offer of Defendant's Exhibits 1 and 2 on the ground——

Mr. Bagley: We offer in evidence what have been marked for identification Defendant's Exhibits 1 and 2; they are the two other sheets of the proof of loss, the first of which plaintiff offered in evidence as Exhibit B, the whole constituting the proof of loss as submitted by Mrs. Prinsen to the Travelers Protective Association as her proofs of loss under the By-Laws of the organization.

Mr. Gustin: We object on the ground that both exhibits are hearsay, and the plaintiff is not bound by them, and they are not a part of the proof of loss or notice claimed.

The Court: Objection will be overruled; I will pass upon it and give them their legal effect later.

Mr. Gustin: Exception.

Defendant's Exhibit 1 received in evidence over plaintiff's objection as aforesaid purporting to be the statement of the attending physician reads as follows:

DEFENDANT'S EXHIBIT 1

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Attending Physician's Statement

(This entire Certificate must be in the handwriting of the physician.)

In the Evidence of the Claim of James Prinsen, Late of Salt Lake, Ut.

1. What are your name and address in full? John J. Galligan, Judge Bldg., Salt Lake City, Utah. 2. Are you

now and for how long have you been engaged in the practice of your profession? Yes. 19 years. 3. When and where did you graduate? Creighton Univ. 1912. 4. How long had you been personally acquainted with deceased? Three years. 5. Was he ever, to your knowledge or belief, rejected for life, accident or health insurance? No. 6. Did [fol. 21] you at any time prior to this attend him for an accidental injury? No. 7. Give the names of any other physicians who ever treated him at this or any other time? Do not know. 8. When were you first consulted or called in this case? Febr. 3, 1931. 9. Where did you first attend him? ——. 10. Were you his regular medical attendant? Yes. 11. Did you make any examination of deceased's person? Yes. 12. Had deceased any mental or physical defect of any kind? No. 13. What, if any, external or visible signs did you find of injury, caused by violent and accidental means? Extensive mutilation of head, arms & body. 14. What was the precise nature of the injury and its extent? Collision between train and truckload of dynamite caps. 15. Was the deceased, to your knowledge, afflicted with any sickness or disease, acute or chronic, at the time? No. If so, what was its nature and to what extent did it contribute to his death? None. 16. Was the deceased under the influence of liquor at the time of your first visit? No. 17. Was he ever, to your knowledge, addicted to the use of stimulants? If so, to what extent. No. 18. What local and constitutional symptoms existed after the injury and what treatment did you adopt? None. 19. State what medicine or anaesthetics you administered or surgical operations you performed. None. 20. What caused, in your opinion, operated to produce death or contributed thereto? Blown to pieces. 21. If an autopsy or post-mortem examination of the body was made, state result. None, as body was mutilated beyond examination. 22. What was the date of his death? Febr. 3, 1931. 23. What do you know directly and personally of the alleged accidental injury? As above. 24. To what extent, if any, was his eyesight or hearing impaired? No. 25. Give all other information you have in regard to the alleged injury, physical condition of deceased at that time, causes of death, etc. (1) Patient in excellent health, prior to death. (2) Inquest return- verdict of accidental death. 26. If you or any other physician treated him medically or surgically

before this time, state when, for what troubles and the treatment given. No other. 27. To what extent, if any, was death attributable thereto or to his physical condition? No connection.

NOTE.—If any other physicians were employed, their certificates must be obtained.

The attending physician will describe the nature of his patient's illness; what local and constitutional symptoms [fol. 22] existed and what treatment was adopted. If a post-mortem examination was made or a coroner's inquest held, a certified copy of the testimony, findings and verdict must be attached.

(Signed) John J. Galligan, Attending Physician.

Dated at Salt Lake this 28 day of Febr., 1931.

Form 355cl—29.

(Rubber stamp across face as follows:) Received Mar. 6, 1931. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, National office.

Defendant's Exhibit 2 received in evidence over plaintiff's objection as aforesaid purporting to be statement of an eyewitness and certificate of clergyman, undertaker and employer reads as follows:

DEFENDANT'S EXHIBIT 2

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Affidavit of an Eye-Witness

In the Matter of the Death of James Prinsen, Late of Salt Lake City, Who was Injured About 2:38 P. M. on the Third Day of February, 1931

My name is William E. James. My address 1228 S-5 East.

1. How long had you known the deceased? Never. 2. Where were you and what were you doing when he met

with the accident?" Left side of Locomotive attending duties as fireman. 3. Where was he when he met with the accident? Supposed to be on motor truck. 4. What was he doing at the time? Don's know. 5. Was he to any extent at all under the influence of liquor or had he partaken of intoxicants within 12 hours? Don't know. 6. Were any persons other than yourself and deceased present at the time he was injured? If so, give their full names and addresses? Late Engineer—B. J. Rugg—Ogden, Utah. 7. State fully how the accident occurred? (Give all details.) At time of accident which resulted in death of James Prinsen & two other men—I was acting as fireman on the D. & R. G. W. R. R. passenger Locomotive involved in the accident, on train #3 going north from Salt Lake City. My only recollection of the event is that [fol. 23] as the train neared the Cudahy Packing crossing at North Salt Lake, I saw a truck approaching from the west & supposed safe would stop before getting on track.—Almost immediately a collision & explosion occurred which resulted in the death of Engineer at my side & myself becoming totally unconscious. This is all I know of the accident. 8. What relation, if any, are you to deceased? None. 9. What is your occupation? Locomotive Engineman.

(Signed) William E. James, Eye-Witness.

STATE OF UTAH,
County of Salt Lake, ss:

Subscribed and sworn to before me by the above named eye-witness, this 3 day of March, A. D. 1931. Name of Official and Title: Homer Holmgren, Notary Public. Post Office Address: Salt Lake City, Utah. (Seal.)

Certificate of the Clergyman

(Relates to Identity of Person Deceased)

STATE OF UTAH,
County of Salt Lake, ss:

I, Elmer I. Goshen of Salt Lake City being duly sworn, depose and say that I, on Sixth day of February, 1931, officiated as Clergyman at the interment of James Prinsen, late

of Salt Lake City, known by me to be the identical person described in the foregoing affidavit and statement.

(Signed) Elmer I. Goshen, Clergyman, Pastor of the First Congregational Church.

Subscribed and sworn to before me this 2 day of March, A. D. 1931. Name of Official and Title: Homer Holmgren, Notary Public. Post Office address: Salt Lake City, Utah.

Certificate of the Undertaker

(Relates to Identity of Person Buried)

STATE OF ——,
County of ——, ss:

I, Clyde Early of Salt Lake City, U- being duly sworn, depose and say that I am an undertaker at Salt Lake City, U- and that I, on Feby. 6th, interred the dead body of James Prinsen late of Salt Lake City, U- at Mt. Olivet Cem- [fol. 24] etery, Salt Lake City, known by me to be the identical person described in the foregoing affidavit and statement. Date of his birth Nov. 19, 1874.

(Signed) Clyde Early, Undertaker.

Subscribed and sworn to before me this 2nd day of March, A. D. 1931. Name and Title of Official: Homer Holmgren, Notary Public. Postoffice address: Salt Lake City, Utah. (Seal.)

Certificate of Employer

1. State what you know of the accident. Nothing from personal experience. 2. Have you read the statement of the Eye-Witness? Yes. 3. Do you, of your own personal knowledge, know that the deceased was injured (or killed) as result of the accident therein described? Yes. 4. On what date did the accident occur? February 3, 1931. 5. Do you know that the deceased was the person injured under the Certificate described? Yes. 6. What was his employment at the time he was injured? Asst. Secretary & Directors. 1. State fully the nature of his duties. General office & occasional visit to magazine. 8. What was he doing when injured? On occasional visit to magazine.

(Signed) "Edgar G. Gibson."

My official position is President & Director. My Post Office address is Salt Lake City, Utah, Box 1404. Dated this third day of March, 1931. If deceased has no employer, this blank must be executed by some reputable citizen who was personally acquainted with him.

Defendant's Exhibit 3 was then offered and received in evidence the same being a copy of the Articles of Incorporation and By-Laws of the defendant corporation in force at the time of the death of the said James Prinsen, the portions of which, so far as may be material to this controversy, are as follows:

DEFENDANT'S EXHIBIT 3

Classes of Members

Sec. 1. There shall be three classes of active members in this Association to be known as Class A, Class B, and Class C members. All members holding certificates of membership in this Association other than Class B or Class C certificates, shall be known as Class A members. Class A and Class C members shall have the same qualifications.

[fol. 25] Sec. 3. Whenever a Class A member in good standing and subject to the conditions, provisions and limitations of this Constitution and Amendments thereto shall, through external, violent and accidental means, receive bodily injuries which, within six months next following the date of said accident, result in the death of said member, his beneficiary shall be entitled on account of such death and subject to the conditions, provisions and limitations of this Constitution and Amendments thereto, to receive $5,000.

Article XII

Exceptions and Provisions Relating to Class A, B, and C Members and Their Beneficiaries

Section 1. This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death beenfits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances: * * * when or while

a member is acting as an aviator or balloonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant, when a member is participating * * * in the moving or transportation of gun-powder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury;

Plaintiff's Exhibit C was thereupon offered and received in evidence the same being the application of the said James Prinsen for insurance in the defendant company with letter attached. The portions of the application, so far as may be material to this controversy, are as follows:

PLAINTIFF'S EXHIBIT "C"

Application for Membership in the Travelers Protective Association of America

Office: Syndicate Trust Building, 915 Olive Street, St. Louis, Mo.

Any white male person of good moral character not under the age of 18 years or over 55 years, actively engaged in one of the following occupations, namely: Traveling or city salesman, buyer, seller, creditman for a wholesale house or firm engaged in a commercial business of a legitimate nature, or a buyer or seller, in the wholesale trade, or manu- [fol. 26] facturer selling to dealers, to be sold against, or selling to mercantile establishments to be used in their business including commission houses and manufacturers, or wholesale dealer, including commission merchants, importers and manufacturers, traveling adjusters for mercantile companies, traveling auditors for wholesale and manufacturing houses, also Presidents, Directors, Treasurers, Secretaries, Department Managers, of manufacturing or wholesale concerns shall be eligible to membership in this Association.

An applicant must be actually identified with the operating or management of the business with which he is connected. Merely owning stock or bonds of a business does not constitute in itself being 'actively engaged' in such business.

Applications must be accompanied with membership fee and dues as set forth in table on front page of application blank. The annual dues are $11.00, payable either annually or semi-annually, in advance, without notice—January 1st and July 1st.

Objects.—1st. To secure the repeal of all Municipal, County, State or Territorial laws imposing or enforcing a license tax on Commercial travelers. 2nd. To secure recognition from Railroads, and obtain as favorable terms on transportation and baggage as are given to any other class of travelers, and to adjust all differences between Railroads and Commercial Travelers on a fair, equitable business basis. 3rd. To secure hotel accom-dations commensurate with price paid. 4th. To elevate the social and moral character of Commercial Travelers as a profession, and to bring about the better acquaintances of members. 5th. To provide a benefit fund in case of death by accident or injury by accident. 6th. To secure business connections for unemployed members.

I, James Prinsen being desirous of becoming a member of the Travelers Protective Association of America, enclose herewith a membership fee of $2.00, and $— due for — months, and do warrant the following statement to be full, complete and true, and agree that the same shall be the basis of my contract of membership with said Association.

Benefits

$5,000 In case of Death by Accident. $5,000 Loss of Both Eyes by Accident. $5,000 Loss of both Legs or both Arms by Accident. $2,500 Loss of one Hand or one Foot by Acci- [fol. 27] dent. $1,300 Loss of four fingers on either hand by Severance. $1,250 Loss of one Eye by Accident. $25.00 Weekly Indemnity not to exceed 104 wks. in case of Total Disability from accident. $12.50 Per week partial disability following total disability not to exceed five wks.

1. Name in Full: —— ——. (Not Initials.) Age: 40 yrs. Height: 5 ft. 7¾ in. Weight: 150 lbs. 2. (Street and Number:) #203 Mecklenburg Apa. E. S. Temple, Residence: Town, Salt Lake City, State of Utah. 3. Address where you desire mail sent: Same. 4. Name of firm represented by you: Western Powder Co. 5. Location of firm (Street and Number): Room 306 Dooly Bldg., (Town) Salt Lake City, State of Ut. 6. Are they actively in the wholesale

business? Yes. Manufacturing Business? Commission Business. 7. What line of goods does your firm sell? Powder. 8. In what capacity do you represent your firm? Salesman. 9. State in detail duties required of you in your present occupation. Saleman. 10. If Salesman, Are You Selling to Manufacturers—Wholesale Trade? Yes. Retail Trade to be Sold Again? Yes.

I understand that if I shall hereafter change my business or vocation from that therein stated that I must notify the Secretary of the Association immediately of such change, as provided in Art. 9, Sec. 6, of Constitution.

11. Are you engaged in any other business? No. If so, state what business. ——. Give full duties required of you in said business? ——. Is your eyesight impaired? No. If so, to what extent? ——. 13. Is your hearing impaired? No. If so, to what extent? ——. 14. Have you suffered the loss of a limb? No. Hand? No. Foot. No. Eye? No. 15. Have you received any bodily injury, leaving you in a crippled condition? No. 16. Have you any physical deformity? No. 17. Have you ever received a rupture? No. If so, which side? ——. If so, do you wear a properly fitted truss? ——. 18. If engaged in the implement or machinery business, state if your duties require that you set up. ——; or if you are required to do expert work. ——. 19. What State Division do you wish to be placed in? Utah, Post A. 20. Have you ever been a member of this Association? Yes. What Division? Don't know. (In Pencil:) Utah Div. 21. Is your application pending in any other Association? No. If so, give name of Association. 22. Have you ever had, or are you now subject to fits, or any disorders of the brain, or any mental or physical infirmities? [fol. 28] No. 23. Have you, or have you ever had Syphillis, Lumbago, Cancer, Paralysis, Fainting Spells, Erysipelas, Rheumatism, Tuberculosis, Diabetes, Brights Disease or Heart Trouble. If so give particulars. No. 24. Do you drink wine, spirit-ous or malt liquors to excess? No. 25. Do you carry accident insurance in any other company or association? Yes. If so, give name of company or association, $5000.00.—26. Have you ever received any money from any accident company or association for injuries to yourself? No. If so, state the nature and date of your injury and the name of company or Association.

——. 27. Has any accident insurance company or association ever rejected your application or declined to reinstate you or cancelled your membership? No. 28. Do you understand and agree that in case of accidental injuries or death resulting from intoxication you or your beneficiary will receive no benefits from this Association? Yes. 29. Do you agree that if injured you will at once call a physician and notify the National Secretary within thirty days in accordance with the Constitution and By-Laws? Yes. 30. Do you understand and agree that this application is not binding and this *this* Association shall not be liable for any injury or death happening prior to the receipt and acceptance of this application by the National Board of Directors with membership fee and dues? Yes. Write Given Name of Beneficiary in Full. 31. To whom do you want death loss paid in case of death from accident? Mrs. James Prinsen. Certificates Cannot Be Made Payable to "Estate," or "Executor."

Each benefit certificate must be made payable to heirs blood relation, affianced wife, or persons dependent upon the member at whose instance issued, to whom he desires the benefit paid in event of his death. Relationship: Wife. (Street and Number 203 Mecklenburg Apa.) Residence: (Town) Salt Lake City, State Ut.

I promise that if admitted to membership in the Travelers Protective Association of America, I will do all in my power to advance the principles and interests of the Association.

I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any examining or attending physicians from disclosing any information acquired while acting in a professional capacity [fol. 29] or otherwise, or rendering him incompetent to testify as a witness in any way whatever.

I do also agree, if accepted as a member of the Travelers Protective Association, that the benefits shall be effective at twelve o'clock noon on the day on which this application is approved and accepted by the National Board of Directors and that the benefits to be paid shall be those only which may be provided for in the Constitution, By-Laws and Articles of the Association in force and effect at the time the accident occurs.

I agree to comply with all the requirements of the Constitution and by-laws of said Association as they now exist or may hereafter be amended.

Signature of applicant in own handwriting: (Signed) James Prinsen.

Dated at Salt Lake City, Ut., this 7th day of Oct., 1915.
Accepted 12 o'clock Noon October 13, 1915.

The letter attached to application and a part of plaintiff's Exhibit C, is as follows:

Western Powder Company, Jobbers of Hercules, Dupont and Giant Dynamite, Black Blasting and Sporting Powder, Fuse, Caps, Electric Exploders.

A. B. Gibson, Manager, P. O. Box 1404, 306 Dooly Block, Salt Lake City, Utah.

10/20/15.

Travelers Prot. Asso., St. Louis, Mo.

GENTLEMEN: Answering your favor of the 16th inst., Name of beneficiary is my wife. Christian or given name Uluetta Prisen.

Very truly yours; (Signed) James Prinsen.

(Rubber Stamp across face: (Unreadable) Oct. 23, 1915.
(In pencil across top:) 133,665.

STIPULATION AS TO CERTAIN FACTS

Whereupon it was stipulated between the attorneys for the plaintiff and the attorney for the defendant in open court as follows:

That the defendant is a corporation as alleged in plaintiff's complaint; that on October 7th, 1915, James Prinsen [fol. 30] made application for membership in defendant company, said applicaion being plaintiff's Exhibit C, and that a certificate of membership was executed and delivered by the defendant company to said James Prinsen on October 13th, 1915, said certificate being represented by plaintiff's Exhibit A; that on February 3rd, 1931, the said James

Prinsen at said time and ever since the 15th day of October having been the husband of Uluetta Prinsen, the beneficiary named in said insurance policy, was killed; that at the time of his death the said James Prinsen was a Class A member of the defendant company in good standing; that James Prinsen at the time he made application for membership in the defendant company made such application in Salt Lake City to poin the Utah Division of the defendant company and was initiated and became a member in Salt Lake City and paid his dues through Post A of the defendant company through Mr. West at the Newhouse Hotel in Salt Lake City, Utah.

The following proceedings and stipulations were had and entered into by the parties in open court by and through their respective counsel of record.

Mr. Gustin: You admit that Mr. Prinsen, the insured, came to his death on the 3rd day of February, 1931, through external, violent and accidental means, and then and there received bodily injuries which within six months—as a matter of fact, instantly——

Mr. Bagley: Instantly.

Mr. Gustin: —next following the date of said accident resulted in his death?

Mr. Bagley: I admit that, and admit more——

The Court: That does not get us very far. Better admit the facts.

The Bagley: As to how it occurred.

The Court: Because that can occur in a thousand ways.

Mr. Gustin: Do you stipulate on the 3rd day of February, 1931, at or near Cudahy Lane, Davis County, State of Utah, a railroad train then and there owned, operated and controlled by The Denver & Rio Grande Western Railway [fol. 31] Company, a corporation collided with the automobile in which the said James Prinsen was riding?

Mr. Bagley: Yes.

Mr. Gustin: Causing bodily injuries to the said James Prinsen which injuries resulted in his death on said day?

Mr. Bagley: I will admit that subject to your admitting the fact that the automobile truck in question, which was collided with by The Denver & Rio Grande train, was loaded with dynamite caps, and that the resulting collision

between the automobile truck and train caused the explosion of the dynamite in the truck and caused the death of Mr. Prinsen.

The Court: Hold on a minute; leave out your "caused"; you are connecting up—that is what happened?

Mr. Bagley: Yes.

The Court: And at that time Mr. Prinsen was killed?

Mr. Bagley: Yes, who was riding in the truck.

Mr. Gustin: We admit that, Mr. Bagley, as part of your case, as part of the defense in this case, upon the further understanding, however, that it is stipulated that Mr. Prinsen was on this truck as a mere invitee, or guest.

Mr. Bagley: I will admit these facts from which the legal inference may or may not be drawn; that the Titanic Powder & Supply Company had ordered some three hundred thousand dynamite caps from the Hercules Powder Company; that they said that Mr. Begaman would be in for those within the next day or so; that the Hercules Powder Company in this city telephoned that order to the Western Powder Company; that the order was received and written up by Mr. Prinsen; that thereafter, within a day or so, Mr. Begaman came in with his truck, automobile truck, and went to the magazine where this powder is kept, north of Salt Lake City, just over the line in Davis County; that Mr. Prinsen took the key to the powder magazine to effect the delivery of these dynamite caps; that after he effected the delivery of the caps he got upon the automobile of Mr. Begaman in which the dynamite caps had been loaded and rode from the magazine to the place of the collision with the Denver & Rio Grande train, which is at a point called the Cudahy crossing, just north of Salt Lake.

[fol. 32] It is further stipulated that Mr. Prinsen was at the time an officer of the Western Powder Company; that he took the key to this magazine and went over with Mr. Begaman on his truck and effected delivery of the powder and was returning on the truck when the accident happened.

Will you stipulate, Mr. Gustin, that while the powder in question belonged to the Hercules Powder Company, the Western Powder Company was the representative of the Hercules Powder Company, in this territory, and that for this trip to the magazine which Mr. Prinsen made, the

Hercules Powder Company paid the Western Powder Company one dollar?

Mr. Gustin: We would object to evidence of that nature on the ground that it is immaterial; but if we may have a ruling on that I will stipulate——

The Court: You admit it as a fact, but object to it on the ground stated. For the present the objection will be overruled.

Mr. Gustin: Exception.

Mr. Bagley: Will you stipulate that as the result of this accident Mrs. Prinsen mad- application to the Western Powder Company, or its insurance carrier, the State Insurance Fund, for compensation, on the ground that her husband was killed by an accident arising out of and in the course of his employment, and that she is now receiving compensation on that account?

Mr. Gustin: I will stipulate that Mrs. Prinsen made application under the industrial law of this state for compensation by reason of the death of her husband, and is now receiving compensation.

Mr. Bagley: Either from her employer or her employer's insurance carrier?

Mr. Gustin: Yes.

The Court: But you object to it as being immaterial?

Mr. Gustin: Yes, over our objection that it is immaterial.

The Court: The objection will be overruled at present. The legal effect of the stipulations will be determined after they are all in.

(Here follows side folios 35 and 36)

[fol. 33] Let me ask you if you are making the point—the distinction in this case that while he was riding on this truck which contained dynamite and it exploded, that his death resulted—possible or probably resulted from the collision in and of itself rather than from the result of the explosion?

Mr. Gustin: Yes, your Honor, we raise an issue on that question of causation.

Mr. Bagley: Then in the record will you admit that in the explosion the engineer of the Denver & Rio Grande engine was killed, Mr. Bagman, the other occupant of the truck, was killed; that when picked up Mr. Prinsen's body was very badly dismembered?

Mr. Gustin: With this reservation there, Mr. Bagley, we won't admit that the explosion caused the death of any of these people, but we will admit they were all killed in the wreck.

The Court: Can you get together upon what the situation was with respect to the destruction of the truck, the damage to the engine, and the persons who were killed or injured, and their bodily conditions? If you could cover that, if that distinction is to be relied upon, we would want the fact rather than somebody's conclusion.

Mr. Gustin: Do you intend to introduce evidence on the question of the speed of the train, matter of that kind?

Mr. Bagley: Yes. I also, unless it is admitted, intend to show that the automobile truck was just demolished, practically destroyed.

Mr. Gustin: We will admit that.

The Court: Haven't you the pictures of the scene, both of the truck and of the engine?

Mr. Bagley: Yes, I am going to put them in.

Thereupon defendant's exhibits numbered 4, 5 and 6 were offered and received in evidence without objection, the same being photographs of the truck upon which James Prinsen was riding, taken after the collision and explosion.

[fol. 34] DEFENDANT'S EXHIBIT 4

DEFENDANT'S EXHIBIT 5

[fol. 35] DEFENDANT'S EXHIBIT 6

Whereupon further stipulations were entered into between the parties as follows:

Mr. Gustin: Will you stipulate affirmatively, Mr. Bagley, that Mr. Prinsen was not employed or connected in any way with the Tintic Powder Company, the owner of the truck in question, and was not driving the truck?

Mr. Bagley: I will stipulate that Mr. Prinsen was not an officer or employee of the Tintic Powder Company, and that so far as I know was not driving the truck.

Mr. Gustin: That is one of the facts I spoke to you about the other day definitely.

Mr. Bagley: I think that is the fact. I would just naturally assume Baganan was the driver of the truck.

Mr. Gustin: And the truck was owned by the Tintic Powder Company?

Mr. Bagley: Yes.

[fol. 36] Mr. Gustin: You are going to submit evidence as to the speed of the train?

The Court: Can't you stipulate on that? What difference does it make whether it was going forty or thirty miles an hour? Certainly was a wreck there. What was the testimony in the other trial as to the speed?

Mr. Gustin: We have a report of the Interstate Commerce Commission that might—have you seen this?

Mr. Bagley: No.

The Court: What speed do they say?

Mr. Bagley: We have the testimony.

Mr. Gustin: At between twenty and thirty-five miles an hour.

The Court: That is my recollection; there were several witnesses that gave it differently.

Mr. Gustin: That after the impact the train went, according to the report—if Mr. Bagley will stipulate—

Mr. Bagley: Will you stipulate, Mr. Gustin, that the Cudahy Packing Plant is located to the north one hundred and fifty or two hundred feet of the crossing — question, and that as a result of the collision and explosion all the windows—substantially all the windows in that plant were blown out and that the glass and meat in the plant were damaged—that is, the meat in the plant was damaged by the broken glass?

Mr. Gustin: Over our objection, your Honor, as to its materiality.

The Court: The objection will be overruled, and all considered finally.

Mr. Gustin: Exception.

Mr. Bagley: Now, as to the speed of the train, I will either read a transcript of the fireman's testimony—unless we can agree to the material facts that he testified to.

The Court: There were several people who testified as to the speed of the train, as I recall it some of the plaintiff's witnesses in that case, also some of your witnesses. I

[fols. 37 & 38] may be mistaken. It is quite a while ago. A good deal of water has gone over the wheel since, and I have not thought of it, but it seems to me the testimony ranged from about twenty-five to thirty-five miles an hour.

Mr. Bagley: Yes, I think there is no doubt it was going that fast, or faster.

The Court: What is the finding of the Interstate Commerce Commission?

Mr. Gustin: The finding here is between thirty and thirty-five miles an hour before the brakes were applied, and then between twenty and twenty-five miles per hour at the time of the collision.

The Court: Of course that is based upon the composite testimony of the various witnesses, I assume; that is in accord with my recollection.

Mr. Gustin: Is that sufficient there, Mr. Bagley, for your purpose?

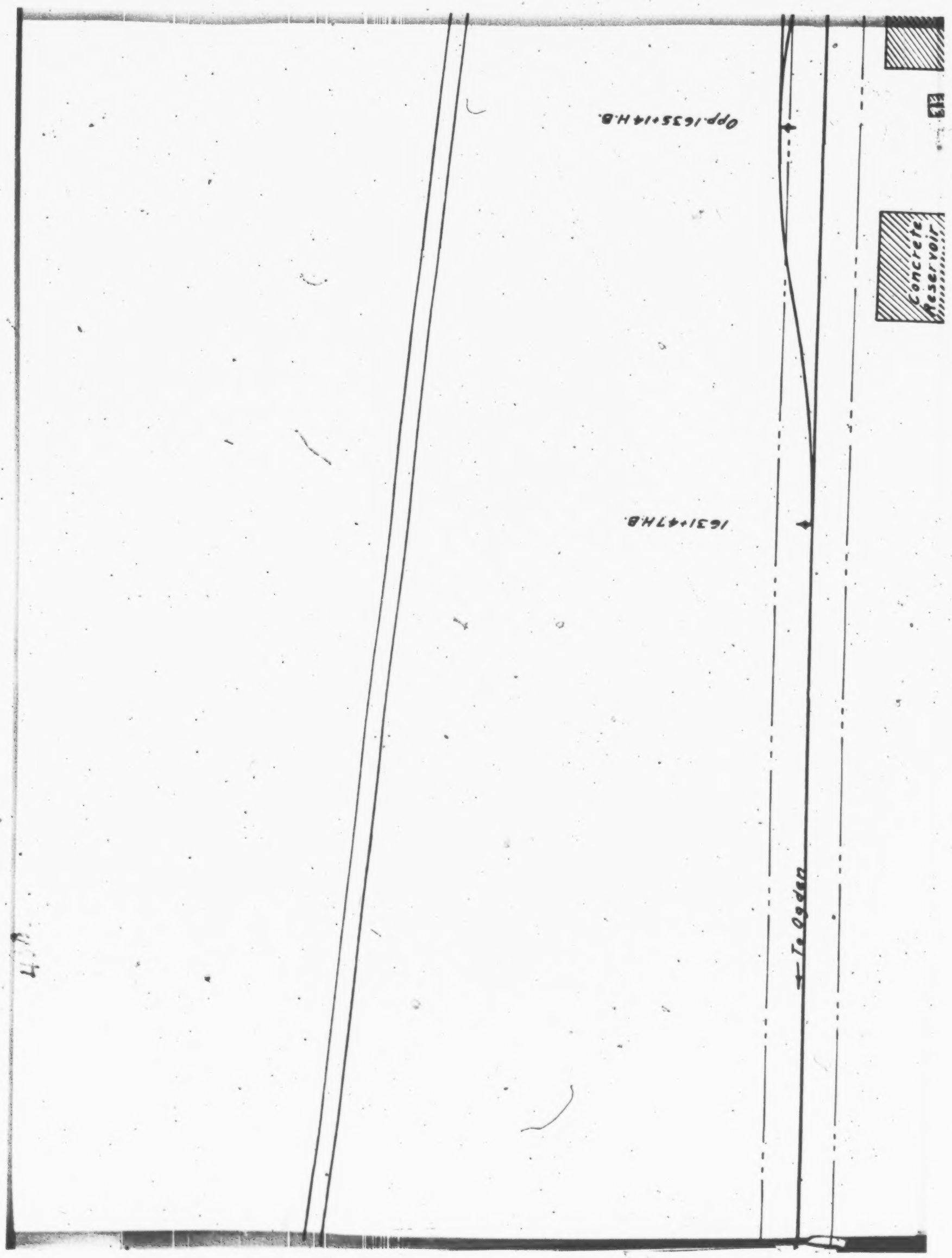
Mr. Bagley: What is that?

Mr. Gustin: That at the time of the collision the train was going between twenty and twenty-five miles an hour.

Mr. Bagley: Yes, I will admit it was going at least that fast.

Whereupon plaintiff's Exhibit D, the same being a map and sketch illustrating the physical conditions at or near the point of the accident and at the time thereof and drawn to scale, was introduced and received in evidence. The said map or sketch being as follows, to-wit:

(Here follows map, side folio 39.)


Opp. 1635+14 H.B.
1631+47 H.B.
Concrete Reservoir
To Ogden

Opp. 1635+14 H.B.

Sheep Building

1639+63

751

Point Where Engine Stopped
1614 Ft. from Point of Accident

Opp. 1641+54 H.B.

Office

1643+94 H.B.
1643+98 N. End Freight Shed

Barn

B.E.R.R.Co.

O.S.L.R.R.Co.

D.&R.G.W.R.R.Co. Main Track

W. U. Telegraph Line

Postal Line

Stock Yards

Sheep Pens

Stock Offices

Cudahy Packing Plant

To Salt Lake City →

Broken 85° East Rail

Location of Track Geometry Inter Section

1636+77 Sta. Bd
1636+82 P.C.

1636+94 Xing Sign

1637+12 24' Xing

1637+28 Stop Sign
1637+37 P.C.

ALL VEHICLES MUST COME TO FULL STOP BEFORE CROSSING TRACKS

W. U. Telegraph Line

Sign Reading

DIRECTION OF TRAIN

68'

Postal Telegraph Line

Pole

Clearance Sign

Visibility 13600' at point

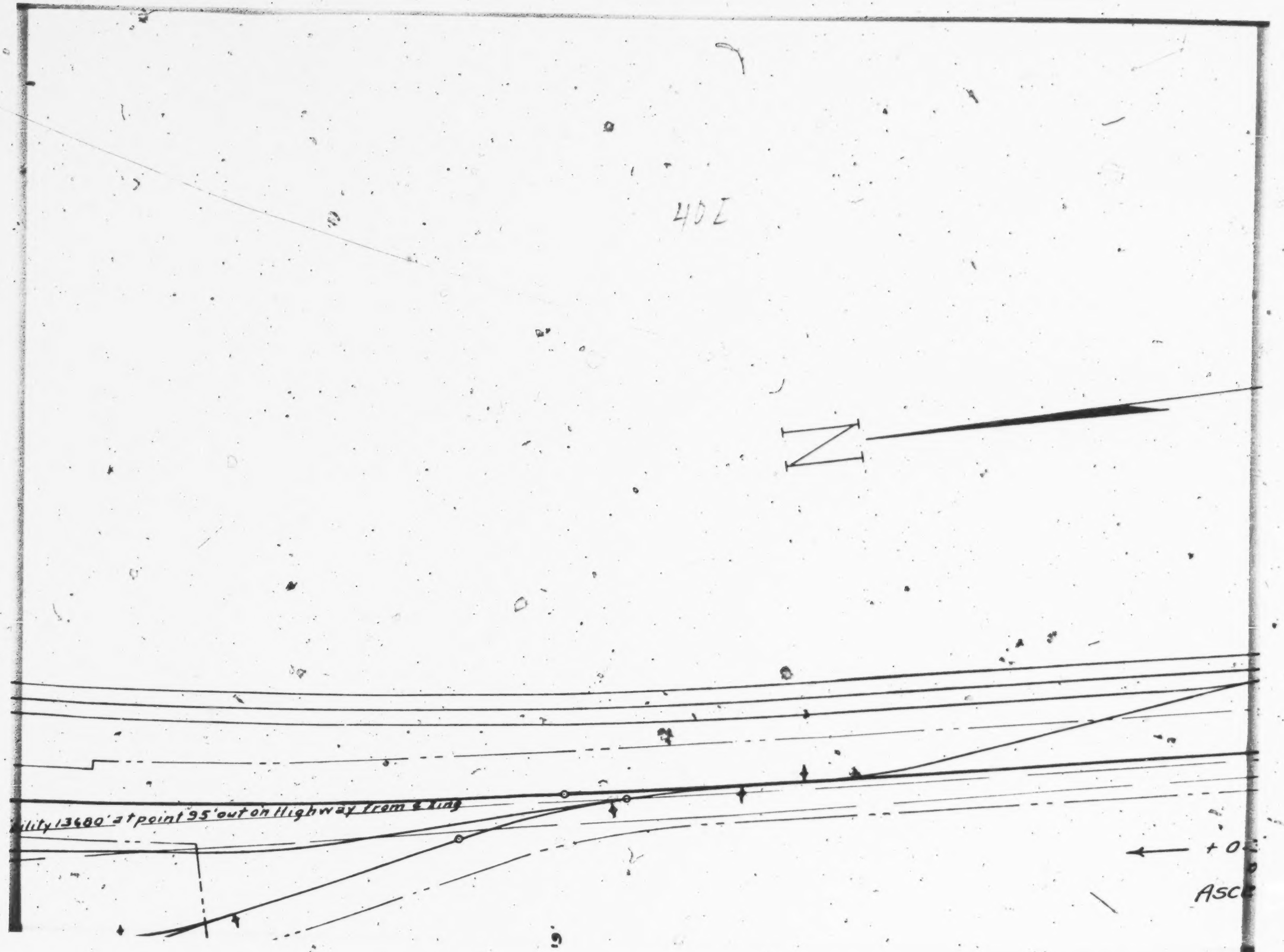
Cudahy Packing Plant

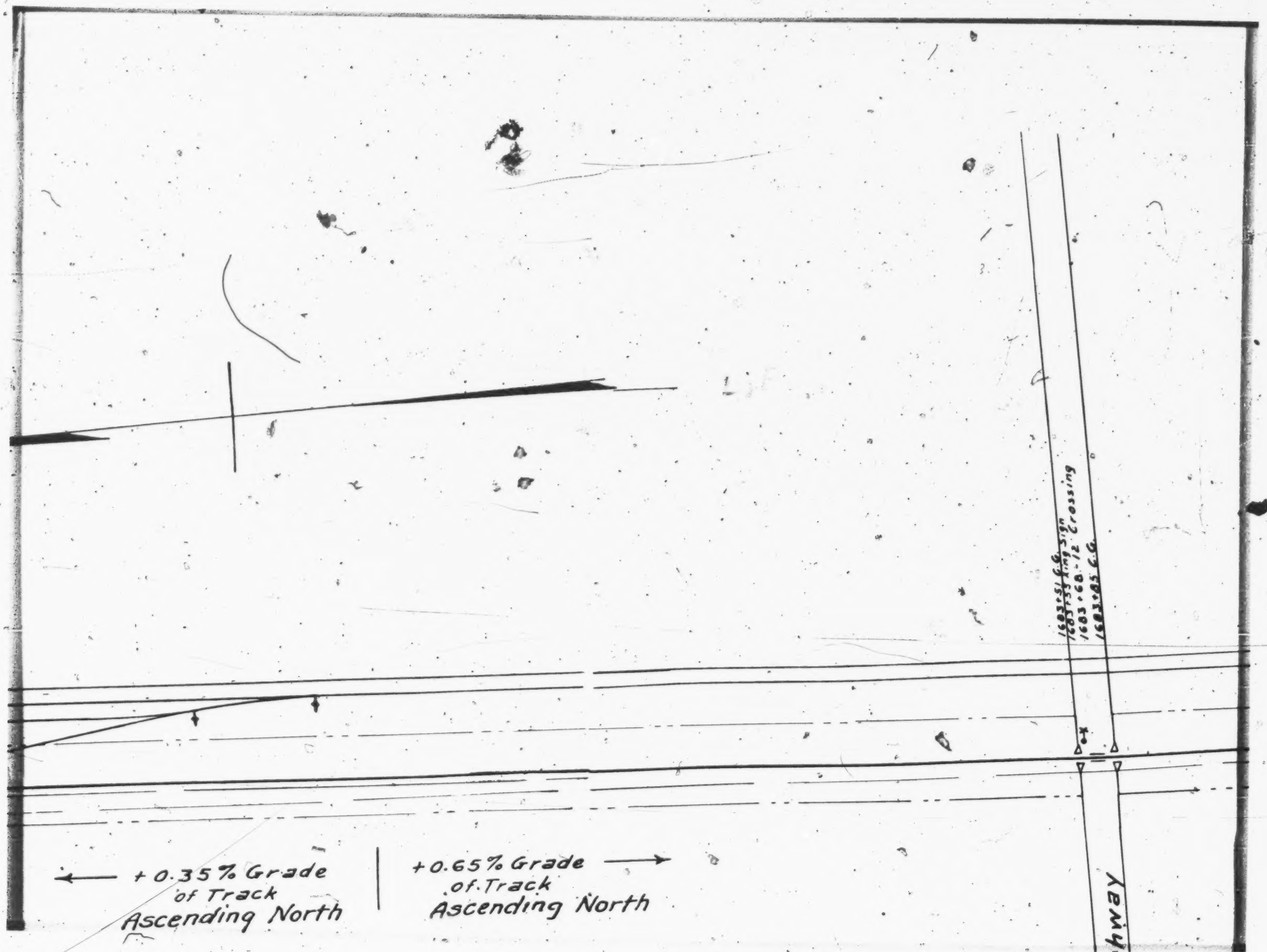
Garage

Visibility 3700' at point 133' out on highway from

1663+36 P.C.

Auto


401
N
ility 13480' at point 95' out on Highway from ℄ King
ASC


+0.35% Grade of Track Ascending North
+0.65% Grade of Track Ascending North
Highway

Highway

1683+51 C.G.
1683+55 Xing Sign
1683+68 - 12 Crossing
1683+85 C.G.

Tolleson

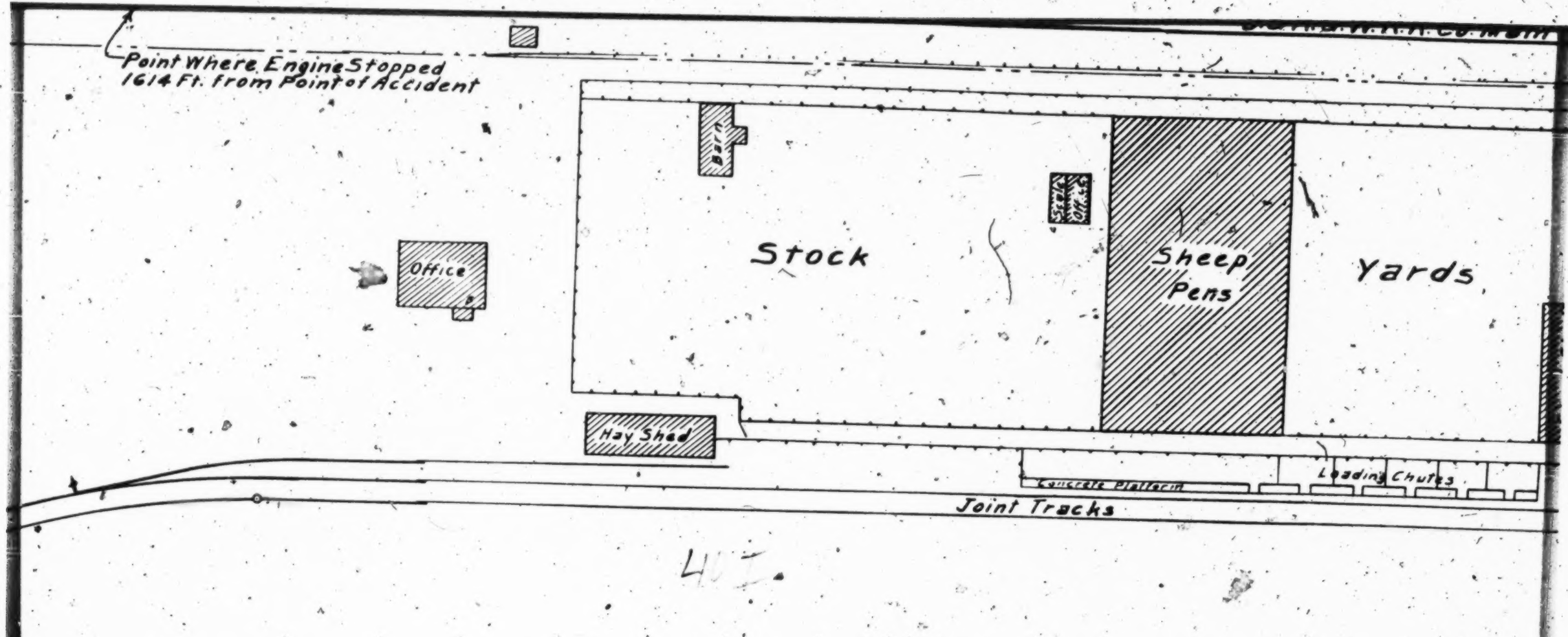
1692+91

750

Concrete Reservoir

Sheep Building

Point Where En
1614 Ft. from P


Point Where Engine Stopped
1614 Ft. from Point of Accident
Barn
Scales
Office
Stock
Sheep
Pens
Yards
Hay Shed
Concrete Platform
Loading Chutes
Joint Tracks

407

D.&R.G.W.R.R.Co. Main Track

W.U. Telegraph Line

Postal Telegraph Line

68

Sign Boards

Pole

Clearance Sign

DIRECTI

Yards

Cudahy Packing Plant

Stock Shed

Stock Shed

Loading Chutes

Garage

Visibility 3700' at point 133

Auto Park

Approximate

Ow.

Ow.

Visibility from this point we
unobscured for distance of
2.6 miles along track

DIRECTION OF TRUCK

Highway

3300 Feet From Turn in Highway to Point of Accident

DIRECTION OF TRAIN

Visibility 13680' at point 95' out on highway from ℄ Xing

Visibility 3700' at point 133' out on highway from ℄ Xing

1663+15.6
P.C. 1°.7'

Approximate Location of Cars Feb. 3-1931

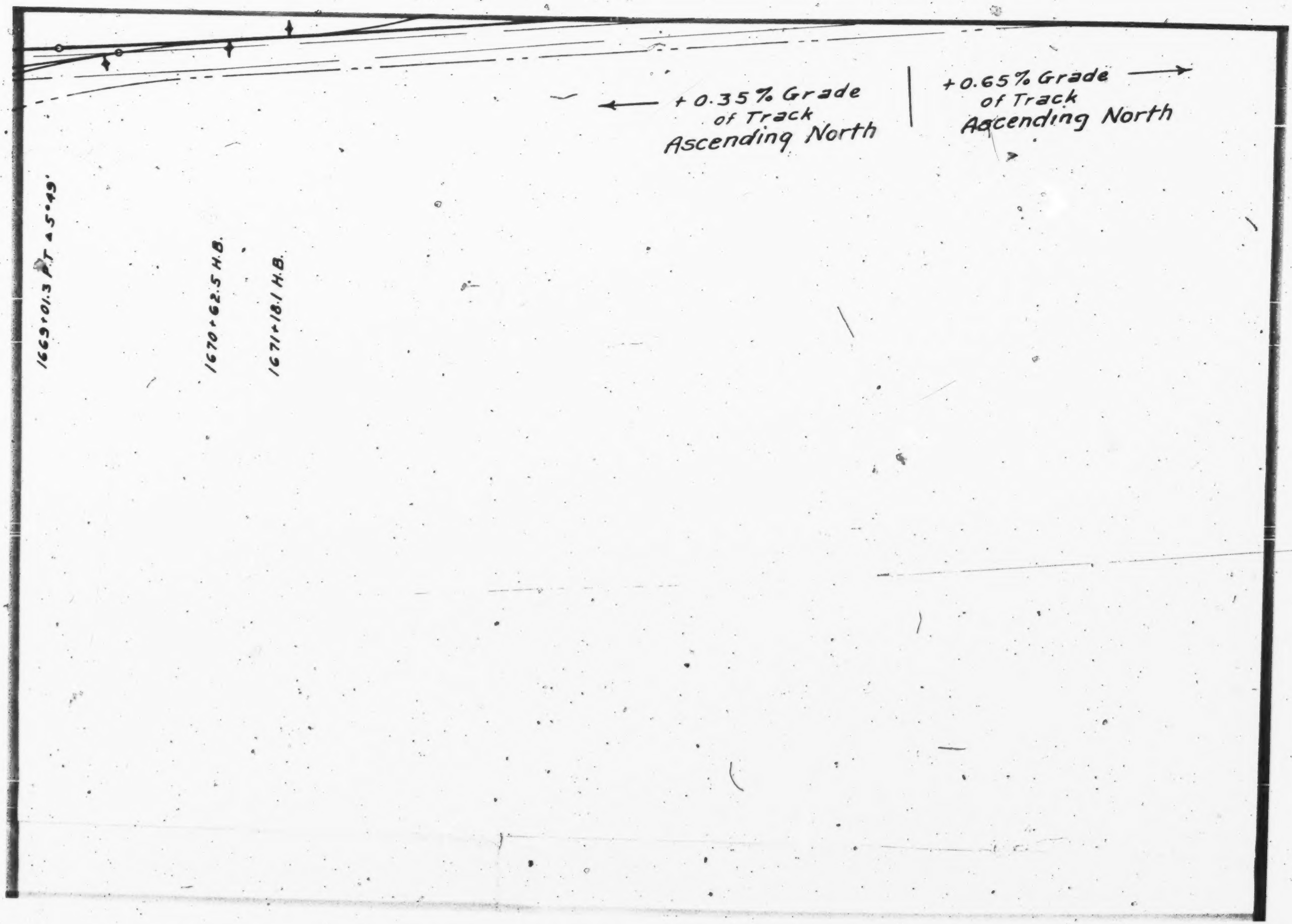
DW

1669+01.3 P.T. 4°49'

1670+62.5 H.B.

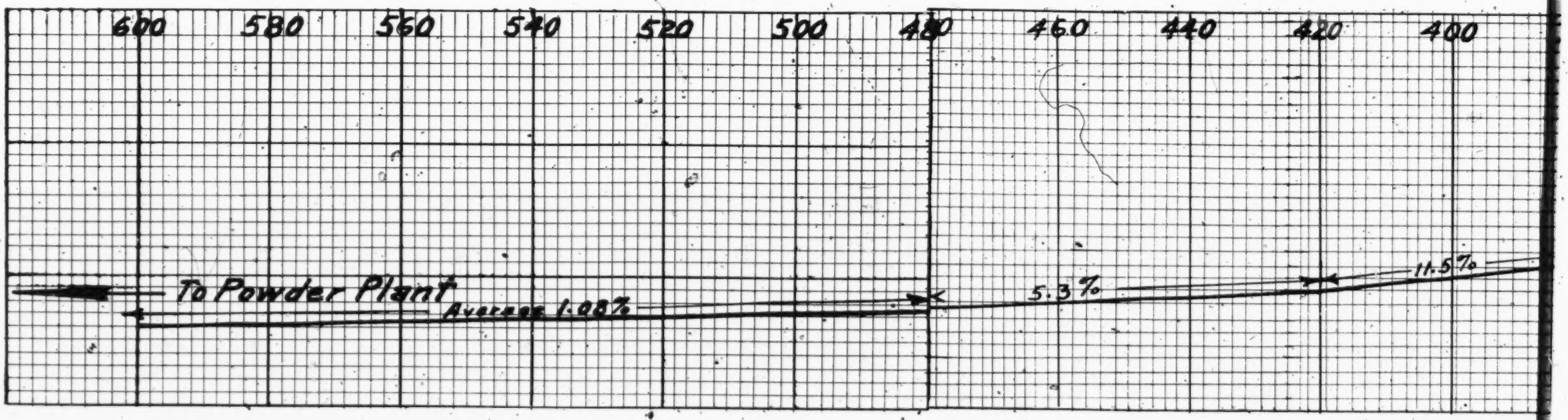
1671+18.1 H.B.

y from this point west
ured for distance of
s along track →


+0.35% Grade of Track Ascending North
+0.65% Grade of Track Ascending North
1669+01.3 P.T. 4.5°49'
1670+62.5 H.B.
1671+18.1 H.B.

Grade
ack
ding North

Highway


600
580
560
540
520
500
480
460
440
420
400
To Powder Plant
Average 1.08%
5.3%
11.5%

420 400 380 360 340 320 300 280 260 240 220 200

DIRECTION OF TRUCK IN

Average 6.6% Grade

11.5%

3.76% Track

2.32.5% Track

2.25% Track

DIF
+ 3300 Fee
in Highw
of Accid

240 220 200 180 160 140 120 100 80 60 40 20

ON OF TRUCK INVOLVED IN ACCIDENT

Average 0.04% — Av. 4.6% — Av. 2.5% — Av. 3.3% Grad

PROFILE OF ROAD

Facing toward Packing Plant

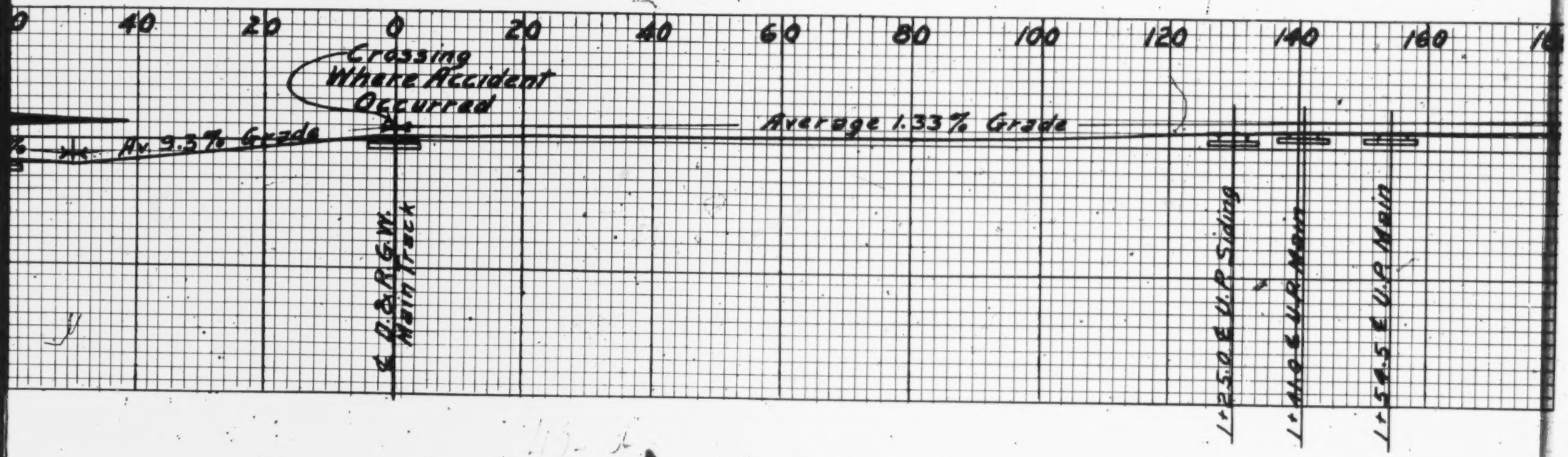
Scale 1" = 20'

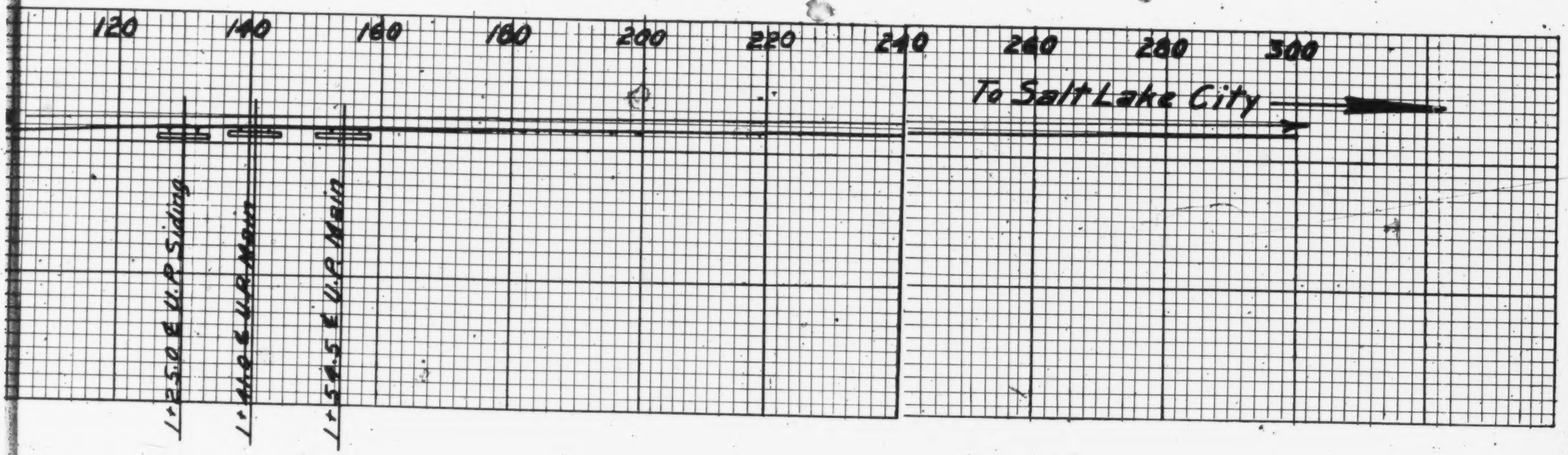
2+32.5 ℄ Track

2+25 ℄ Track

+73.0 ℄ Track

+62.5 ℄ Track


40
20
0
20
40
60
80
100
120
140
160
Crossing
Where Accident
Occurred
Av. 3.3% Grade
Average 1.33% Grade
C.B.&Q.R.R.
Main Track
1°25.0 E U.P. Siding
1°11.0 E U.P. Main
1°54.5 E U.P. Main


120
140
160
180
200
220
240
260
280
300
To Salt Lake City
1+23.0 ℄ U.P. Siding
1+44.6 ℄ U.P. Main
1+54.5 ℄ U.P. Main

SKETCH
Showing
LOCATION OF ACCIDENT
To
D.&R.G.W. TRAIN NO. 3
At
NORTH SALT LAKE, UTAH
FEB. 3 - 1931
Scale: 1" = 100'

[fol. 40] STIPULATION AS TO CERTAIN EVIDENCE, ETC.

Whereupon, it was further stipulated, in open court, between the attorneys for the respective parties, that part of the testimony of the fireman of the Denver and Rio Grande Train involved in the accident, taken in another suit, might be read into the record by the defendant, and thereupon the testimony of the fireman to the following effect was read into the record by the defendant's attorney, Mr. Bagley, to-wit: The railroad track was straight in both directions on either side of the crossing and the train was about two hundred and fifty feet from the crossing when the fireman saw the truck at which time the truck was eighty-five feet west of the crossing; that the train was running about forty miles an hour and the fireman estimated the speed of the truck at fifteen or sixteen miles an hour. He saw two men in the truck sitting in the covered cab side by side, and he further saw that the truck was loaded with boxes.

It was stipulated that Dr. John J. Galligan, who signed the attending physician's statement, Exhibit 1, if called would testify that Mr. Prinsen's body was exceedingly mutilated, the head and arms and the body—that no autopsy or post-mortem examination was made because the body was mutilated beyond examination.

Whereupon C. R. FITZGERALD was called as a witness on behalf of the defendant and having been first duly sworn testified as follows: That he resided in Salt Lake City, Utah; that he was a Claim Adjuster of the Denver and Rio Grande Railroad Company and as such Claim Adjuster went upon the scene of the accident in question about forty minutes after its occurrence; that the accident occurred about 2:40 P. M. on the 3rd day of February, 1931, whereupon defendant's exhibits 7 to 14 inclusive, were thereupon marked by the reporter and identified by the witness as being photographs of the crossing at which the accident occurred, taken from various angles, and were offered by the defendant and admitted in evidence without objection.

Whereupon the witness further testified that approaching the crossing from the west, the first large obstruction was the Cudahy garage, approximately ninety feet west of the crossing a person could see a train approaching from the south some three-quarters of a mile and have a clear un-

(Here follows side folios 41 to 52)

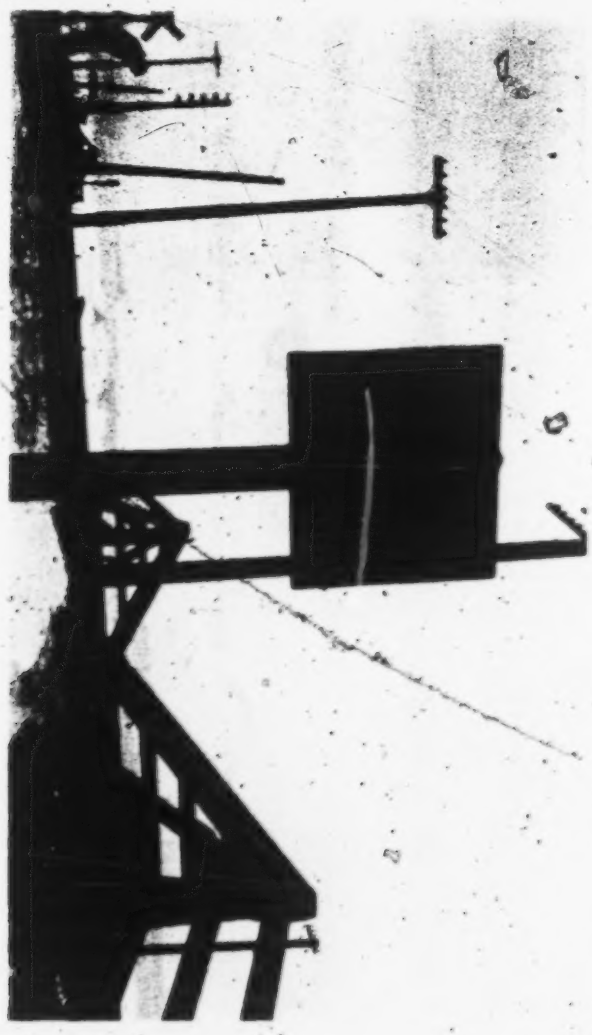
of the track; that from a point ninety feet west of the crossing a person could see a train approaching from the south some three-quarters of a mile and have a clear un-
[fol. 41] obstructed view of the approaching train with the exception of a few telephone poles.

Whereupon defendant's exhibits 15, 16 and 17 were marked by the reporter and identified by the witness as fairly representing the condition of the automobile cab and engine after the explosion, were offered by the defendant and received in evidence without any objection.

Whereupon the witness further testified that the train moved on about a quarter of a mile after the collision; that it was a regular passenger train carrying three coaches, an engine and tender; that the remains of the truck after the collision were north and east of the crossing down below the rails in a depression approximately forty or fifty feet from the crossing; that at the Bamberger Shops, approximately a quarter of a mile from the collision, one hundred and forty-seven panes of glass were blown out; that near the crossing there was a station of the Oregon Short Line Company, the doors of which were blown out, records scattered and the stove knocked over; that in the post office building adjoining the Oregon Short Line Station all of the windows were broken out and records were strewn around; that the train which collided with the truck was two minutes late in leaving Salt Lake City; that the engine struck the rear end of the truck and that the dynamite caps were on the rear end.

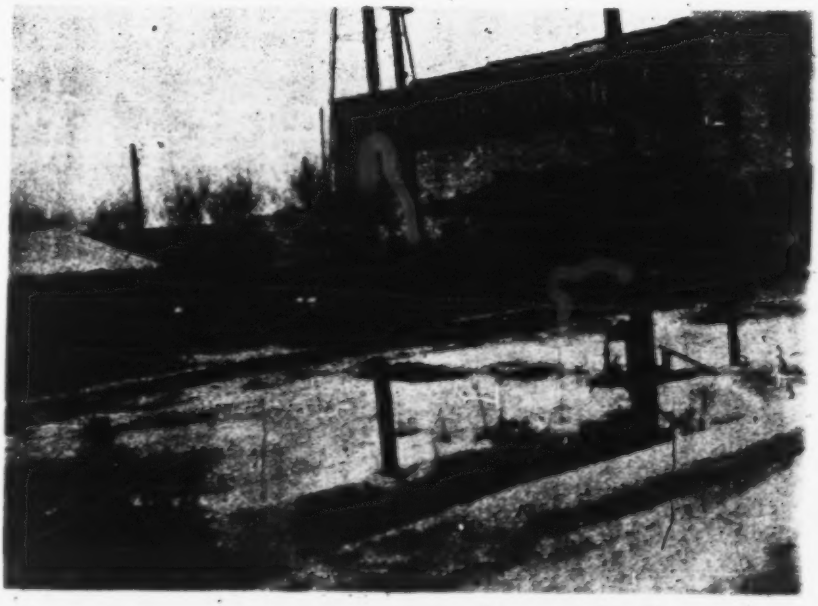
[fol. 42] DEFENDANT'S EXHIBIT 7,

introduced in evidence as aforesaid, is a photograph showing the sign just west of the main line of the Denver and Rio Grande Western Railroad track and south of the travel part of the highway and with reference to the crossing at the point of the accident, was taken at a point south of the travel part of the highway and looking eastward. The exhibit is as follows:



[fol. 43] DEFENDANT'S EXHIBIT 8,

introduced in evidence as aforesaid, is a photograph taken from a point one hundred and fifty feet south of the center of the crossing involved, the photographer standing in the center of the main line track. The view is looking northwest from the center of the main line. The tracks shown in the photograph are spur tracks leading to the loading dock at the east side of the Cudahy Plant. The exhibit is as follows:

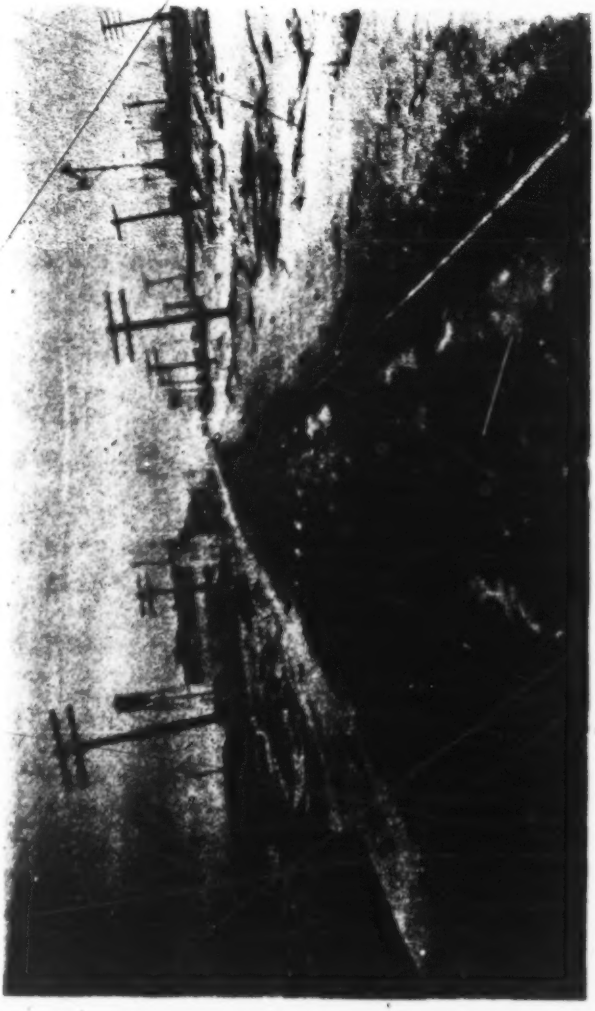


[fol. 44] DEFENDANT'S EXHIBIT 9,

introduced in evidence as aforesaid, is a photograph taken from a point approximately seven hundred feet south of the crossing involved, looking northward. The photograph was taken at the north end of the curve in the Denver and Rio Grande Western main line track, which curve is the first one south of the crossing. Exhibit number 9 is as follows:

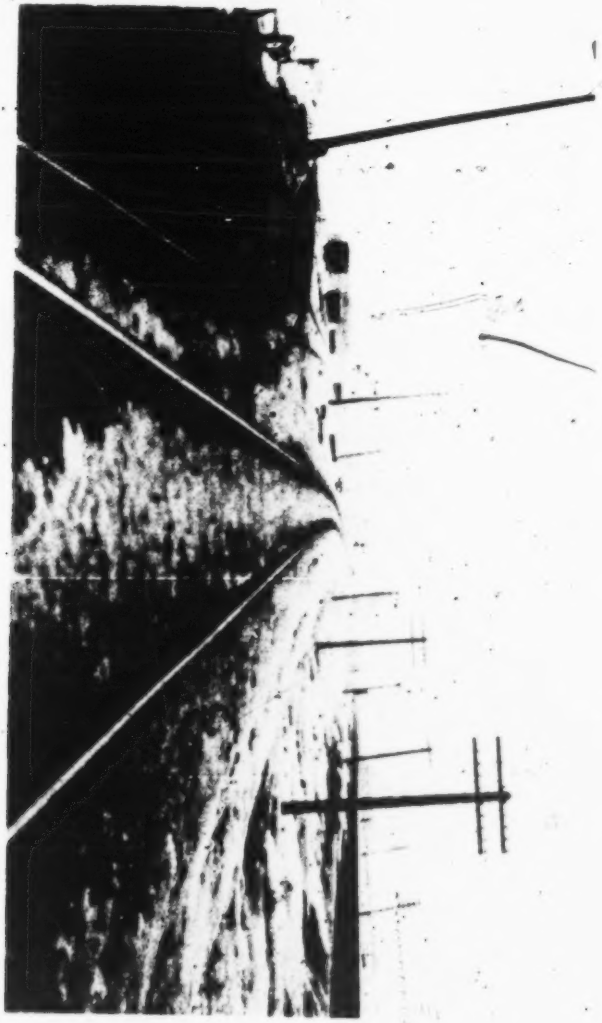
[fol. 45] DEFENDANT'S EXHIBIT 10,

introduced in evidence as aforesaid, is the same view as Exhibit 9, except that the photographer was standing at a greater distance from the crossing and at a point approximately two hundred and fifty feet nearer to the crossing than the view shown by Exhibit 11. Exhibit 10 is as follows:



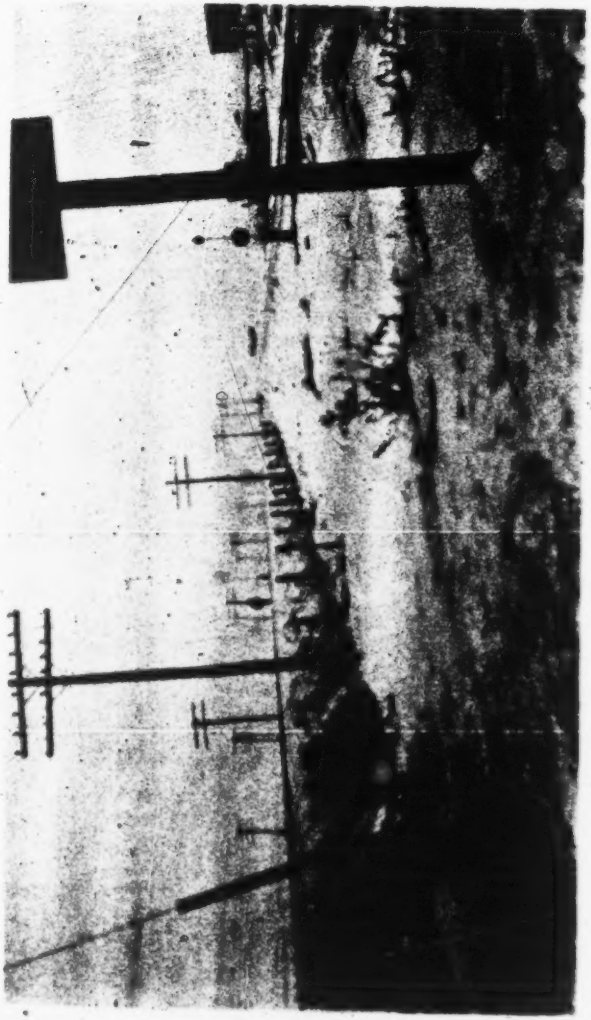
[fol. 46]. DEFENDANT'S EXHIBIT 11,

introduced in evidence as aforesaid, is the same view as defendant's exhibits 9 and 10, the photographer standing approximately twelve hundred feet south of the crossing and in the center of the main line track, the picture looking north toward the crossing. The track in the foreground and in the center of the picture is the track upon which the train was running at the time of the accident. Exhibit 11 is as follows:



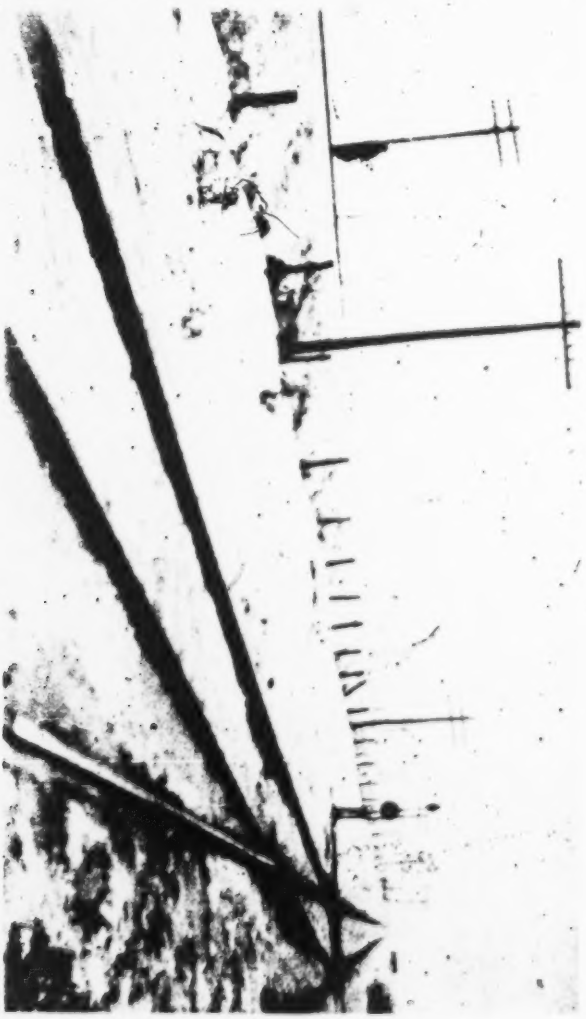
[fol. 47] DEFENDANT'S EXHIBIT 12,

introduced in evidence as aforesaid, is a photograph looking south from the center of the highway at a distance of approximately fifty feet west of the west rail of the Denver and Rio Grande main line track, which can be seen beyond the switch which leads to the stock corrals. The crossing at the point of the accident is toward the east and is not shown in the exhibit. Defendant's Exhibit 12 is as follows:



[fol. 48] DEFENDANT'S EXHIBIT 13,

introduced in evidence as aforesaid, is a photograph taken from a point seventy feet west of the main line track from the center of the west spur track leading to the loading dock of the Cudahy Plant, the camera being held at the center of the highway. The photograph is looking south and the crossing at the point of the accident is to the east and not shown in the exhibit. Defendant's Exhibit 13 is as follows:



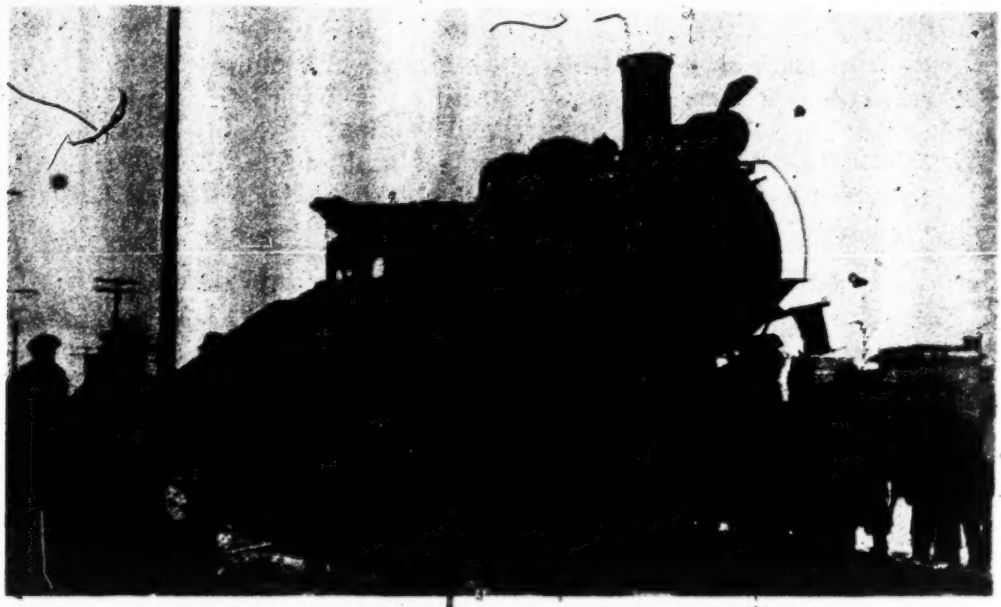
[fol. 49] DEFENDANT'S EXHIBIT 14,

introduced in evidence as aforesaid, is a photograph taken at a point in the center of the road and eighty feet west of the track upon which the train was running at the time of the accident, the camera pointing south and east. The photograph does not look toward the crossing at the point of the accident. Defendant's Exhibit 14 is as follows:

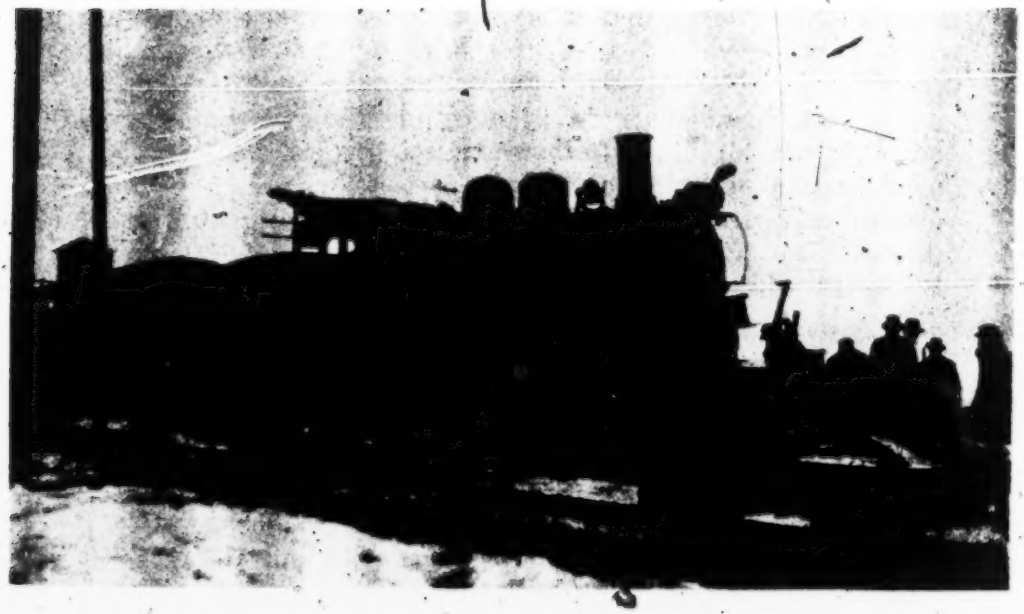
Defendant's Exhibit 15

[fol. 50] Defendant's Exhibits 15, 16 and 17, introduced in evidence as aforesaid, are photographs representing the conditions of the engine cab and engine after the accident and explosion. Defendant's Exhibit 15 is as follows:

[fol. 51] DEFENDANT'S EXHIBIT 16 is as follows:



DEFENDANT'S EXHIBIT 17 is as follows:



[fol. 52] Whereupon both sides announced to the court that they rested and thereupon the defendant moved the court for a directed verdict and the following proceedings were had:

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Bagley: Comes now the defendant, the Travelers' Protective Association of America, and moves the court to direct a verdict in its favor on the grounds and for the reasons:

First: That it affirmatively appears that this defendant is a fraternal benefit association, not an insurance company in the commonly accepted sense,—

The Court: Not an old line company.

Mr. Bagley: Not an old line company.

That is is governed not by what we commonly call a policy of insurance, but by a constitution and by-laws; that it gives benefits of certain kinds and in certain amounts both for injuries and for death when the accident occurs in a certain way, and that it exempts certain risks, and that it affirmatively appears in this case that the association shall not be liable to a member for any death benefits when he is killed while participating in the moving or transportation of gunpowder, dynamite or other explosive or explosives.

And that it affirmatively appears in this case that when Mr. Prinsen met his death he was participating in the movement and transportation of some three hundred thousand dynamite caps loaded on the truck, which exploded when the collision occurred between that truck and the Denver & Rio Grande train.

Second: That the constitution of the association further provides that the association shall not be liable to the member or his beneficiary in case of death when the death is the result of a voluntary or unnecessary exposure to danger or to obvious risk of injury;

And that it affirmatively appears in this case that the deceased, Mr. Prinsen, on the occasion in question, was voluntarily riding upon a truck loaded with dynamite or its equivalent, and that he heedlessly, recklessly, if you please,

in broad daylight, drove that truck loaded in that way on which he was seated on to a railroad crossing in front of an approaching train which he could have both seen and heard in time to have avoided the accident, which it was his duty to do.

[fol. 53] The Court: You say he drove; isn't any evidence he drove.

Mr. Bagley: I mean he permitted it to be driven.

The Court: He rode in the car that was driven.

Mr. Bagley: That's it.

DECISION

Thereupon the court took the matter under advisement and after argument of counsel announced its decision as follows:

The Court: This policy sued upon was issued subject to the provision, found in the constitution referred to by counsel, Article XII, Section 1:

"This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death benefits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances; when inflicted by a member on himself, while sane or insane; when there are no visible marks of injury upon the body (the body itself not being deemed such a mark in case of death); when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics; when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, or wrestling; when or while a member is acting as a sailor or soldier or is participating in war or riot; when or while a member is acting as an aviator or balloonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant; when a member is participating in public or agreed automobile racing; or in wrecking, mining, blasting, or in the moving or transporta-

tion of gunpowder, dynamite, or other explosive substance or substances; when a member is murdered; when resulting from hazardous adventure or an altercation or quarrel; when there is a disappearance of a member; when the result of voluntary over-exertion (unless in a humane effort to save a human life); when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

And then proceeds with a list of others, which I will not read; quite a number of exceptions in this policy from liability.

[fol. 54] It will be noticed, I think, that a few of the clauses read used the words, "when caused by," or words of similar meaning, while others simply relate to time or condition, being "when" or "while."

The two clauses under discussion today belong to the "when" division. "When a member is participating in * * * the moving or transporting of gunpowder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

The insured was killed in a collision between an automobile in which he was riding and a Rio Grande train, at the crossing near the Cudahy Packing Company's plant, just outside of Salt Lake City.

The automobile or truck was loaded with dynamite caps, being an explosive substance or substances within the meaning of the clause in the constitution. The rear end of the car was struck by the engine. Under the stipulation it would appear that the front of the truck had gotten over the track, but not sufficiently to clear it; just how much of the rear end was still on the track and hit by the engine, I believe is not mentioned or contained in the stipulation.

The insured was riding in the cab, by the side of the truck driver. They were coming east; the railroad train was moving north, with the result that the insured was sitting on the side next to the approaching train. The train was in plain view of the driver of the truck, and of the deceased, from a point about eighty feet from the crossing.

The train was moving, according to the testimony of the fireman, when he first observed the truck, about forty miles an hour. I believe he estimated the truck was moving about

fifteen or sixteen miles an hour. The fireman observed the truck from the time he saw it, if not constantly, nearly so, from the time he first saw it until about the time the collision occurred. He saw the two men in the car—in the cab of the truck. He is the only witness, and I believe the only testimony in the record with respect to the two men in the car is that contained in his testimoy.

I believe it is not covered by your stipulation, what these [fol. 55] men who were driving the automobile did or attempted to do, except he testified he observed them in the car.

They were not there by chance, it appears. By prearrangement between the parties referred to in the stipulation the insured, who was employed by a powder company, went out to the powder magazine beyond the railroad track and westerly from the Cudahy Packing Plant for the purpose of getting these dynamite caps in a truck. He had the key to the magazine.

I don't know whether it is definitely stipulated in the record or not, but it is quite apparent they went out together in the truck.

Now, I am not particularly familiar with dynamite caps, so as to know what sort of bulk three hundred thousand dynamite caps would make. Presumably they were in boxes of some sort, and probably in a number of boxes. The court will take notice, however, that that number of caps would create an explosion of tremendous power if exploded at once, simultaneously.

Now, he went out there for the purpose of making delivery to the truck driver for the purchaser of the dynamite caps, as I understand the record. What happened at the magazine we don't know. We do know that they went for the purpose of loading these caps into the truck and hauling them away. Whether he assisted in loading, of course, is unknown. And as nothing occurred in that part of the business, it is not of great importance.

Having loaded the truck, the driver and the insured got into it and were returning, I presume over the same route that they had used in going to the magazine.

The language of the Constitution is that the policy does not apply and no liability is created when a member is participating in the moving or transportation of explosive substances. Was he participating in the moving or transpor-

tation of these dynamite caps while riding back from the magazine where they had been loaded on to the truck, is the question.

He was not driving the truck. But the exception is not based upon participating in the moving or transportation [fol. 56] of a truck. It is participation in the moving or transportation of dynamite.

I think the word "participating" is used in a practical sense, and should be so construed in this case.

If, when they arrived at the magazine and he picked up boxes and carried them from the magazine and put them in the truck, was he participating? If he sat in the truck and received them from the other man and placed them in position on the truck, was he participating in the moving or in the transportation of this dynamite?

He might have stood in the magazine, at the door, and handed them out to the other man; the other man may have loaded them into the car. He may have stood by, and let the other man do it all.

But from the time they began to move the dynamite out of the magazine and into the car there was a moving, and in a limited sense a transportation of dynamite caps.

If this language in the constitution is to be construed in a very narrow sense, then it would be limited to any act on his part with respect to the moving or transportation of the dynamite caps. But if it is to be construed in the sense that it means having entered upon this business of delivering to the purchaser of the caps bargained for, the order filled, and he went out with the driver of the truck to make delivery, then he became a participant from the time the operation of it began; and it seems to me that having gotten out there in that way, the natural thing for him to do would be probably to return in the same way. And riding in the same automobile with the driver, with that sort of load, he assumed some sort of responsibility with respect to the situation as it might arise.

It seems to me that the natural thing for a man to do that goes out to load dynamite, or a quantity of dynamite caps like this, gets in an automobile or truck with the driver to return, at least to his office, would feel that he owed some sort of responsibility to see that those caps were being transported safely. Dangerous merchandise, if we may so call it, as very well proven in the result of this drive.

Now, I assume when they approached that railroad track [fol. 57] that both of them saw it, because we must conclusively presume that people see what is right before them.

Now, it is to be presumed that he saw that approaching train; he was sitting on the side next to it; it was in plain view; or should we indulge the presumption that he was blind, and did not see it?

If this jury should go out and find—and I submitted it to them—did that man see that train approaching, or didn't he, under the evidence in this case, they were to find he did not see it, upon what sort of presumption would that finding be based?

So that in the decision of this case I presume conclusively that he saw this approaching train, and that the driver did, too.

With what result? If they saw the train, or if the driver saw it—he had the management of the car—he must have concluded that he could make the crossing.

We can not imagine that those two men drove that eighty feet and were so blind or so thoughtless or had their minds so concentrated upon something else that though plainly within view they never saw the train.

So I conclude that the only reasonable presumption here is that the approaching train was seen, and the driver, at least, concluded he could make the crossing ahead of it, and he got more than half across, but he didn't quite get over.

Now I will take up the other ground for a directed verdict relied upon by counsel.

"When the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

Now, if the deceased saw that train and his automobile was being driven by his companion at his side fifteen or sixteen miles an hour, and the train was approaching, coming twice that fast or more, perhaps, and he was some seventy or eighty feet away when it was observed, which would place the train probably some two hundred feet up the track from the crossing, during that short interval of time while they were constantly approaching a common point and apparently inevitably getting there about the same time, or get by by the bare skin of his teeth, what should he have done? The danger was certainly obvious. [fol. 58] And if he kept his seat in the car it was certainly

voluntary, assuming that he saw the train approaching and stayed in the car, the chance that he took surely would be voluntary, because it would be conscious, and I am inclined to think that is the correct construction to give to that section of the constitution.

It is not mere passive negligence, that is the result of careless oversight or want of care in taking notice. I am inclined to think the plaintiff's construction of the interpretation of that section is the correct one. A thing to be voluntary implies a will, and to exercise a will implied knowledge, and choice.

I think the conclusion is imperative that these men saw this train and thought they could get over the track before it reached the crossing. I don't know what happened. Maybe the train was moving faster than they thought. Maybe the road was such that they were not making the speed for that distance that they concluded or thought they could make. But in any event, the car was driven apparently with the intention of getting over the track before the train reached it.

Now, was that an unnecessary hazard or risk?

"When the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

It seems to me it was both voluntary and unnecessary. He was not driving the car, but a man could afford to take the chance of jumping out of the side of the automobile traveling fifteen or sixteen miles an hour with much less chance of serious injury than he could take the chance of beating a railroad train to the crossing in that same automobile, particularly when it had all that dynamite in it.

Strictly speaking, I do not think that the doctrine of negligence, or the term, rather, negligence, is an exact word to be used in connection with this section of the constitution. It has more of the element of the assumption of risk. A man who consciously knows his surroundings takes the chances. Of course, the term "assumption of risk" is not a term that is applied to negligence except as it arises between employer and employee. Its use has that limitation, but by analogy the liability to the member ceases when the death is the result of voluntary or unnecessary exposure to obvious risk of injury. If a man takes a chance [fol. 59] and is injured or killed, he forfeits his right to recover under the policy, or loses it.

Under the State of facts in this case, gentlemen, none of them being in dispute, I am unable to see what there is to submit to the jury with my interpretation of the meaning of the language of the policy or the constitution which is a part of the certificate.

It seems to me at the time of this unfortunate accident he was both participating in moving and transporting these dynamite caps, and that under the circumstances of the case he voluntarily and unnecessarily exposed himself to a very obvious risk of injury.

With that view of the case it becomes the duty of the court to grant the motion and direct a verdict for the defendant, and you may have your exception.

Mr. Gustin: The record may show our exception.

Thereafter by order of the court timely made the plaintiff's time within which to serve and lodge with the Clerk of this court her Bill of Exceptions was enlarged and kept alive to and including the 10th day of July, A. D. 1932.

And now, in furtherance of justice and that right may be done, the plaintiff, Uluetta Prinsen, tenders and presents the foregoing as her Bill of Exceptions in this case and to the action of the court prays that the same may be settled, allowed, signed and sealed by this court and made a part of the record in this cause as provided by law.

Dated this 1st day of July, 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Plaintiff.

Lodged this 1st day of July, 1932.

W. B. Wilson, Clerk, by V. P. Ahlstrom, Deputy Clerk.

Received copy of the foregoing Bill of Exceptions this 1st day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

[fol. 60] Comes now the defendant, Travelers Protective Association of America, by and through its attorneys of record, Bagley, Judd and Ray, and consents to the allowance and settlement of the foregoing Bill of Exceptions constituting and containing all of the evidence and pro-

ceedings had on the trial of said cause; all amendments proposed by said defendant having been consented to by said plaintiff and engrossed therein.

Dated this 11th day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been duly proposed, served and lodged with the clerk of said court within the time allowed by law and timely orders of this court and all the amendments proposed thereto by the defendant having been duly allowed and engrossed therein, and said Bill of Exceptions and the settlement and allowance thereof having been approved by said defendant and being now presented to the undersigned judge of said court before whom said cause was tried and said proceedings had, the same is now certified by me to be full, true and correct and to constitute and contain all of the evidence offered or introduced, proceedings had and exceptions taken on the trial of said cause and is hereby signed, certified, allowed, settled and sealed by me as plaintiff's Bill of Exceptions; and

It Is Hereby Ordered that said Bill of Exceptions be filed and made a part of the record in said cause.

Tillman D. Johnson, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME IN WHICH TO PREPARE, SERVE AND LODGE BILL OF EXCEPTIONS

At this 16th day of June, 1932, comes plaintiff by H. W. Gustin, her attorney, and on his motion it is ordered that plaintiff be given to July 9, 1932, within which to prepare [fol. 61] and lodge bill of exceptions, and it is further ordered that said plaintiff may withdraw exhibits 1 to 17 for preparation of transcript on appeal.

IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING ON APPLICATION TO SETTLE BILL OF EXCEPTIONS—Filed July 7, 1932

To defendant above named and its attorneys, Bagley, Judd & Ray:

You And Each Of You will please take notice that on Tuesday, the 12th day of July, 1932, at the hour of 10:00 o'clock a. m., or as soon thereafter as counsel may be heard at the chambers of the Honorable Tillman D. Johnson, judge of the above entitled court, at Ogden, Weber County, State of Utah, plaintiff will ask said court to settle, allow, sign and seal her proposed Bill of Exceptions lodged with the clerk of said court on the 1st day of July, A. D. 1932, and copy of which having been served upon you on said day.

Harley W. Gustin, D. Worth Clark, Attorneys for Plaintiff.

Received copy of the foregoing Notice this 6th day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER ALLOWING APPEAL—Filed Aug. 24, 1932

To the Honorable Tillman D. Johnson, District Judge:

The above named plaintiff feeling aggrieved by the judgment rendered and entered in the above entitled cause on the 1st day of June, A. D. 1932, does hereby appeal from said judgment as entered in said District Court to the United States Circuit Court of Appeals for the Tenth Circuit for the reasons set forth in the assignment of errors filed herewith, and she prays that her appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the

[fol. 62] Tenth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of her, be made.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Copy of the foregoing Petition for Appeal received this 24 day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 24, 1932

Now comes the plaintiff in the above entitled cause and makes and files the following assignment of errors upon which she will rely upon her prosecution of the appeal in the above entitled cause, from the judgment made and entered herein by this Honorable Court on June 1st, 1932.

The United States District Court in and for the District of Utah, Central District, erred in the trial and decision of said cause in the following particulars:

I

The court erred in sustaining defendant's motion for directed verdict in favor of said defendant and against the plaintiff and made at the close of all of the evidence.

II

The court erred when, upon motion of the defendant and at the close of all of the evidence, it directed a verdict for the defendant against the plaintiff for no cause of action.

III

The court erred in not submitting for determination the issues between the parties, to the jury.

[fol. 63]

IV

The court erred in rendering and entering judgment upon the verdict herein and the same is against law for the rea-

son that the said verdict is not supported by the evidence, there being no evidence whatever in said cause justifying the said verdict.

Wherefore plaintiff prays that said judgment be reversed and that the United States District Court in and for the District of Utah, Central Division, be ordered to enter a judgment reversing said judgment.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellants.

Copy of the foregoing Assignment of Errors received this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING COST BOND—Filed Aug. 26, 1932

The appeal in the above entitled cause is allowed as prayed and bond fixed in the sum of Three Hundred ($300.00) Dollars, the same to act as a damage and cost bond if appellant fails to make good her plea.

Dated this 25th day of August, A. D. 1932.

Tillman D. Johnson, District Judge.

Copy of the foregoing Order received this 24 day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

RECITAL AS TO BOND

[Bond on appeal in the sum of $300, approved by the trial judge, with appellant as principal and New York Casualty Company as surety, was filed in the District Court on August 24, 1932.]

[fol. 64] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed Aug. 24, 1932

Comes now the above named appellant and hereby elects to have the printing of the transcript in the above entitled cause done under the supervision and direction of the Circuit Court of Appeals.

Dated this 24th day of August, A. D. 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Copy of the foregoing election as to printing received this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

RECITAL AS TO CITATION

[Citation in proper form, directed to appellee, was issued on August 25, 1932, and on the same day service of said citation was accepted by counsel for said appellee.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 24, 1932

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause to the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

1. Complaint.
2. From removal proceedings.
(a) Petition for removal.
(b) Order for removal.
(c) Bond for removal.
3. Answer.
4. Reply.
5. Minute order of court directing verdict.
6. Verdict.
7. Judgment.

[fols. 65 & 66] 8. Bill of Exceptions with Order approving same.

9. Minute order, dated June 16th, extending time in which to prepare, serve and lodge Bill of Exceptions.

10. Notice of hearing on application to settle Bill of Exceptions.

11. Petition for order allowing appeal.

12. Assignment of Errors.

13. Order allowing appeal and fixing cost bond.

14. Bond and approval thereof.

15. Citation.

16. Præcipe for record.

17. Election as to printing.

18. Clerk's certificate.

Dated this 24th day of August, A. D. 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Received copy of the foregoing Præcipe for Transcript of Record this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] Minute entry of argument and submission, January 16, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, APRIL TERM, 1933

No. 752

Mr. J. H. Peterson and Mr. Harley W. Gustin (Mr. D. Worth Clark was with them on the brief), for appellant.

Mr. Paul H. Ray and Mr. Robert L. Judd (Mr. Emmett M. Bagley was with them on the brief), for appellee.

Before Lewis, Phillips and McDermott, Circuit Judges

OPINION—June 22, 1933

Lewis, Circuit Judge, delivered the opinion of the court.

Appellant brought this suit as the named beneficiary in a certificate of membership that had been issued to her husband by appellee, a Missouri corporation. The certificate provides for payment of $5,000 to the beneficiary, "Whenever a member in good standing shall, independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death * * *." It is not questioned or doubted that the member James Prinsen, appellant's hus- [fol. 68] band, was a member in good standing on February 3, 1931, when he came to his death in the manner stated supra in the certificate. He was killed at a highway crossing when an auto truck loaded with dynamite caps, on which he was riding, was struck by an engine of a passenger train.

The defense is bottomed on two provisions of appellee's Articles of Incorporation and its By-Laws, made a part of the certificate by reference, which read thus:

"This Association shall not be liable to a member or his beneficiary for * * * death benefits * * * when a member is participating * * * in the moving or transportation of gunpowder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury; * * *."

After both parties had adduced evidence, the court sustained appellee's motion for an instructed verdict, and that ruling is assigned as error.

The material facts are these: James Prinsen became a member of the association in 1915. At that time he was a salesman for the Western Powder Company, and so stated in his application. At the time of his death he was a director and assistant-secretary of that company. A few days before Prinsen's death the Tintic Powder and Supply Company gave an order to the Hercules Powder Company for 300,000 dynamite caps. These three companies all appear to have business offices in Utah. The Hercules Com-

pany asked the Western Company to fill the order. The request was received by Mr. Prinsen, and he was notified at the time that Mr. Begaman would come to Salt Lake City for the caps within the next day or so. The order was received and written up by Mr. Prinsen. Within a day or so and on February 3, 1931, Begaman came with an auto truck to receive the caps. They were in a magazine north of and outside of Salt Lake City. When Begaman came Prinsen took the key to the powder magazine and went with Begaman to deliver to him the caps. Delivery being made, he got on the truck and sat on the seat by Begaman for the purpose of riding back to Salt Lake City. This seems a reasonable inference. The truck was owned by the Tintic Company. As Begamen drove easterly on the highway he [fol. 69] came to the railway crossing, drove upon it, and the rear end of the truck was struck by the engine of the passenger train and thrown from the track. There was a terrific explosion of the dynamite caps. Prinsen was sitting on the south side of the truck by the driver. Prinsen, Begaman, and the engineer on the railway engine were all killed, and the fireman on the engine was rendered unconscious, but later recovered. The accident occurred about 2:40 P. M. There were the usual railway warning signals at such crossing. After the collision the wreckage of the truck was north and east of the crossing in a depression below the rails approximately forty or fifty feet from the track. There are buildings about the crossing. The signs that appear on them in photographs indicate that some of them are a plant of Cudahy Packing Company. There were some obstructions of the view of the approaching train along the highway, but these were at intervals, and it is clear from the proof that Begaman and Prinsen had ample opportunity to have seen the approaching train had they looked in that direction before they reached the crossing. The fireman saw the truck when the train was about 250 feet from the crossing. The train was then moving at a speed of about forty miles per hour, and he estimated the speed of the truck at fifteen or sixteen miles per hour. He also saw two men in the truck sitting in the covered cab side by side and that the truck was loaded with boxes. The brakes were applied to the railway engine. When it struck the truck it was running at approximately twenty-five miles per hour. There was no proof and it

seems improbable that any can ever be adduced tending to show that Prinsen or Begaman saw or heard the train.

The question is whether the court erred in not submitting the case to the jury. The District Judge in ruling on the motion for directed verdict held that Prinsen "was both participating in moving and transporting these dynamite caps, and that under the circumstances of the case he voluntarily and unnecessarily exposed himself to a very obvious risk of injury." Each of the propositions thus announced constitutes a decision of fact, and we are constrained to hold that each presented an issue for determination by the jury. Participation in the moving or transportation of a thing requires action, effort, or direction. It is not an unreasonable inference that the sole purpose of Prinsen in getting on the truck with Begaman was to ride back to [fol. 70] Salt Lake City, that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation. Of course, the dynamite caps while in the truck could not be moved or transported without moving the truck. We had occasion to consider the definition of the word "participate" in Head v. N. Y. Life Ins. Co., 43 F. (2d) 517. There is no proof as to what Prinsen did or did not do while riding with Begaman from the magazine to the railway crossing. That lies wholly in inference from the facts and circumstances of the case, and a reasonably prudent person might infer that he was wholly indifferent and passive as to Begaman's control of the truck and thereby the moving and transportation of the dynamite caps at the time of the accident. No occasion requiring Prinsen's assistance appears, unless he saw the train when the impulse of self preservation would have caused him to tell Begaman to stop. Nor does it appear to us a necessary and unavoidable inference that Prinsen in riding on the truck or in remaining there when Begaman drove it on the railway track voluntarily or unnecessarily exposed himself to danger or to an obvious risk of injury. We are not advised by any proof in this case as to the probability of explosions of dynamite caps while being transported in a truck over an ordinary country highway. Mr. Prinsen probably was informed on that subject, but we think ordinarily a court and jury are not. Nor is there proof that Mr. Prinsen knew the train was near just before the automobile was driven on the railway

track. If he or Begaman knew that fact the natural impulse of Begaman would have been to stop and of Prinsen to warn Begaman that he stop. The certificate does not exclude liability should the member's death result from his negligence or occur when he was negligent. So we think it cannot be said that the only reasonable inference from the facts and circumstances of the case is that Prinsen voluntarily and unnecessarily exposed himself to an obvious risk or injury when the automobile was driven on the railway crossing.

The opinion of Judge Lurton in Mt. Adams & E. P. Inclined Ry. Co. v. Lowry, 74 Fed. 463, widely cited on the power and duty of a court to direct a verdict, contains this:

"It seems to us to follow from both reason and authority, that there is a difference between the legal discretion of the court to set aside a verdict as against the weight [fol. 71] of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence. In the latter case it must be so insufficient in fact as to be insufficient in law; in the former case it is merely insufficient in fact, and it may be either insufficient in law, or may have more weight, and not enough to justify the court, in exercising the control which the law gives it to prevent unjust verdicts, to allow a verdict to stand. * * * We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that

the evidence is insufficient in law, direct a verdict against that party."

We do not think the evidence in the present case measures up to the rule deduced by Judge Lurton from the many controlling authorities which he reviewed.

Mr. Justice Harlan, sitting with the Court of Appeals in the Sixth Circuit, delivered the opinion in Travelers' Ins. Co. v. Randolph, 78 Fed. 754, in which he said:

"The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, [fol. 72] unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind."

In that opinion he also considered the import to be given to the words "voluntary exposure to unnecessary danger" in accident policies, and concluded that those words are to be held as importing an exposure by the assured to an unnecessary danger with the intention or design at the time to risk the consequences of such exposure, that those words are not equivalent of ordinary negligence, and that "a degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity."

On the first point supra see Slocum v. Ins. Co., 228 U. S. 364, 369; Small Co. v. Lamborn & Co., 267 U. S. 248, 254; Felton v. Spiro, 78 Fed. 576; and on the second point see Ashenfelter v. Employers' Liab. Assur. Corp., 87 Fed. 682; Standard Life & Acc. Ins. Co. v. Thornton, 100 Fed. 582; Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926; Zurich Gen. Acc. & Liab. Ins. Co. v. Flickinger, 33 F. (2) 853; Whalen v. Peerless Cas. Co., 75 N. H. 297, 73 Atl. 642; Keene v. New England Mut. Acc. Ass'n, 161 Mass. 149, 36 N. E. 891; S. C., 164 Mass. 170, 41 N. E. 203; Rowe v. United Comm. Trav. Ass'n, 186 Ia. 454, 172 N. W. 454; Payne v. Fraternal Acc. Ass'n, 119 Ia. 342, 93 N. W. 361; Walter v. People's Health & Acc. Ins. Co., 173 Mich. 581, 139 N. W. 865. The cases in the state courts do not appear to be in entire harmony. Diddle v. Continental Cas. Co., 65 W. Va. 170, 63 S. E. 962, is not in accord with those cited above. Some

difference in phraseology of exempting clauses are in part at least responsible for this difference. But we think the facts in the case under consideration and the inferences that could be appropriately drawn from them made a case for the jury, and that the District Judge erred when he in effect held that on the proof plaintiff's case was insufficient in law.

Reversed and Remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

McDERMOTT, Circuit Judge, dissenting:

In Head v. New York Life Ins. Co. (C. C. A. 10), 43 F. (2d) 517, the insured met his death while riding in an airplane, but not flying it; he was not a passenger in the accepted sense of the word, for he was in the plane to get [fol. 73] information necessary for writing a policy on the plane. Suit was brought on an accident policy which did not cover death "resulting from participation as a passenger or otherwise in aviation or aeronautics." The trial court sustained a demurrer to the petition and this Court affirmed. The word "participate" was there distinguished from the word "engage," and was held to mean "to take or have a part or share in." I am satisfied with that decision and that definition. By the same token, it seems to me that one riding on a truck-load of dynamite caps is "participating in the moving or transporting thereof."

There is another reason, to me more impressive. In construing insurance contracts, the same search should be made to ascertain the intent of the parties as in other contracts, and the language used ought to be taken in its "plain, ordinary and popular sense." Chase v. Business Men's Assur. Co. (C. C. A. 10) 51 F. (2d) 34. The purpose of a clause may also be looked to if the words used are not clear. Both the language and the purpose of this clause seem clear to me. There is a hazard attendant upon the transportation of explosives—a hazard which the deceased shared equally with the driver on the seat beside him. The parties intended to, and I think did, agree that such hazard was not a risk insured against.

In any event, I see nothing to go to the jury. The facts are not in dispute; in fact, they were largely stipulated. Whether such facts disclose that deceased was participating in the transportation of explosives depends upon the meaning of the word "participating," as used in this written contract, which is a question for the court and not the jury. Since I think the deceased was so participating when he met his death, I think the judgment below should be affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 22, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

[fol. 74] On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court for a new trial; and that Uluetta Prinsen, appellant, have and recover of and from The Travelers Protective Association of America, a corporation, appellee, her costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed July 24, 1933

Petitioner, The Travelers Protective Association of America, appellee in the above entitled cause, respectfully but earnestly petitions this court to grant a rehearing in order that an opportunity may be afforded for a further and fuller hearing on the interpretation of the contract considered in the two opinions herein, and on which this court divided, and in support of this petition appellee represents:

1. That this court has erred in reversing the judgment of the District Court;

2. That this court has erred in refusing to hold and decide as matter of law that James Prinsen was at the time

of his death participating in the moving or transportation of explosives contrary to the provisions of the benefit certificate involved in this case;

3. That the majority opinion of this court in this case, if allowed to stand, will create a conflict with another decision of this court (Head v. New York Life Ins. Co., 43 Fed. (2d) 517) and with a decision of the Fifth Circuit (Pittman v. Lamar L. I. Co., 17 F. (2d) 370);

4. That the majority opinion in this case fails to recognize and apply the now well settled legal distinction between the terms "engaged in" and "participating in" as those terms are used in accident insurance policies and as they have heretofore been uniformly interpreted by this Court and other federal and state courts;

5. There is no ambiguity about the meaning of the word participate. It has a well settled meaning, adopted by all the courts without exception, which has heretofore been [fol. 75] followed and adopted by this court—hence this case presents a question of law for this court and not a question of fact for a jury.

Wherefore, we respectfully but confidently submit that if this court will grant our petition for rehearing and reopen this case for further consideration, we believe it can be shown, and will be found by this court, that this petition for rehearing is not presented simply because we are disgruntled or disappointed with the result but is earnestly presented for the purpose of securing for the parties and the court an opportunity to give fuller consideration to an opinion which is in conflict with other decisions of this court and other Federal and State courts.

Respectfully submitted.

Emmett M. Bagley, Robert L. Judd, Paul H. Ray,
Attorneys for Petitioner.

Certificate of Counsel

I, Emmett M. Bagley, one of the attorneys for the appellee, do hereby certify that I have carefully examined and considered the foregoing petition for rehearing, know the contents thereof, and that in my opinion the same is well

founded in point of law and is not made for the mere purpose of delaying the determination of said cause.

Emmett M. Bagley.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 27, 1933

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

[fol. 76] In United States Circuit Court of Appeals

Motion to Stay Issuance of Mandate—Filed Aug. 2, 1933

Comes now The Travelers Protective Association of America, the appellee in the above entitled cause, and shows to this court:

That on the 22nd day of June, 1933, this court made and entered its order and decision reversing the judgment of the trial court; that thereafter, and on the 27th day of July, 1933, an order was made herein overruling appellee's motion for a rehearing.

That appellee intends with all reasonable expedition to apply to the Supreme Court of the United States for a writ of certiorari to review the proceedings and judgment had herein, and for such reason desires that the issuance of a mandate in this action be stayed.

Wherefore appellee prays that the mandate of this court be stayed and withheld for a period of thirty days.

Dated this 31st day of July, 1933.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Aug. 4, 1933

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section [fol. 77] 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,032. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 429. The Travelers Protective Association of America, petitioner, vs. Uluetta Prinsen. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1933. No. 429, O. T., 1933.